SUPREME COURT, U.S.
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No. 74-1326

In the

Supreme Court of the United States

OCTOBER TERM, 1974

INDIANA HARBOR BELT RAILROAD COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
GENERAL AMERICAN TRANSPORTATION CORPORATION and
NORTH AMERICAN CAR CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Indiana Harbor Belt Railroad Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered February 11, 1975.

OPINIONS BELOW

The findings of fact and opinion of the District Court for the Northern District of Illinois, entered November 7, 1973, is reported at 368 F. Supp. 904, and is printed in Appendix B.

The opinion of the Court of Appeals for the Seventh Circuit, entered February 11, 1975 is not yet reported, and is printed in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 11, 1975. This Court's jurisdiction is invoked under Title 28 U.S.C. §1354(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States — AMENDMENT V

Title 49 U.S.C. Section 2, which is printed in Appendix G.

Title 49 U.S.C. Section 15(13), which is printed in Appendix H.

QUESTIONS PRESENTED

Whether the Court below erred in approving the interpretation of the involved tariffs made by the Interstate Commerce Commission.

Whether the Court below erred in holding that the District Court exceeded its authority in deciding that the Commission's interpretation of the tariffs precipitated a violation of Section 2 of the Interstate Commerce Act (Title 49 U.S.C.).

Whether the Court below erred in declining to rule on the Constitutional issue.

STATEMENT OF THE CASE

On March 2, 1970, the Indiana Harbor Belt Railroad Company commenced two suits in the United States District Court against General American Transportation Corporation and North American Car Corporation, respectively, for recovery of switching charges accrued on the movement of empty privately owned tank cars moving on their own wheels on the Indiana Harbor Belt Railroad, to and from car repair facilities owned by the aforementioned car companies and located on the Indiana Harbor Belt. The causes of action arose under the laws of the United States regulating commerce, 49 U.S.C. §§3(2), 6(7) and 16(3), and the District Court had jurisdiction of the action under 28 U.S.C. 1337.

The tariff authority on which the Indiana Harbor Belt Railroad Company relied was IHB Tariff 325-U, I.C.C. No. 1160 (A1a)*, which provided for a switch charge of $20.21 per car on "freight cars moving on their own wheels". Under this tariff provision the defendant car companies had paid such switching charges on all privately owned cars other than tank cars for many years. However, the Indiana Harbor Belt neglected to bill them for the tank cars in suit. Upon filing of these suits, the car companies filed a counterclaim for damages under Sections 8 and 9 of the Interstate Commerce Act asking a refund of all switching charges paid by them on all cars other than tank cars for three prior years. The basis of their counterclaim was Maurer's Mileage Tariff 7, I.C.C. H-32, which is a tariff dealing with the compensation to be paid

* Refers to Appendix and page therein.

by railroads for the use of privately owned cars which are leased to shippers by the car companies and tendered under load to the railroad by the shipper. Payment is set up on a mileage basis. This tariff contains a provision which allows setting off loaded miles against empty miles in a given accounting period (A2a). If there is an excess of empty miles over loaded miles at the end of this period, the registered owner of the car must pay the standard freight charge for moving empty cars on their own wheels as contained in the Uniform Freight Classification Tariff, plus switching and other accessorial charges (A3a). This is called the equalization rule.

There is also an exceptions item in the Mileage Tariff (A2a) which provides that the rules and mileage allowances published in the Mileage Tariff will not apply "on movements of empty cars for which tariff charges are assessed under tariff authority." The Indiana Harbor Belt contended the switch charge contained in their Tariff 325-U was within this exceptions item. The car companies contended the charge was not applicable, and if applicable, would be unreasonable and unlawful. Their contention that the IHB tariff was inapplicable was grounded on Item 25 of the Mileage Tariff (A2a), which mentions the application of the Mileage Tariff Rules to repair movements "unless otherwise provided herein."

The District Court referred the issue to the Interstate Commerce Commission under the doctrine of primary jurisdiction pursuant to the Administrative Procedure Act, 5 U.S.C. 554. The preliminary report of the I.C.C. hearing examiner found the switch charge applicable, reasonable and lawful (A25a). The Final Report of Division 3 of the Commission reversed the Examiner and found that the IHB tariff was not applicable under Exceptions Item 30(a) in the Mileage Tariff and that there was no tariff

rate available within the meaning of Item 30(a) (A46a). The record of the proceedings before the Commission showed that not only did the car companies pay these switch charges on private cars pursuant to IHB Tariff 325-U, but also carrier-owned cars moving to and from these same repair plants for the same purposes were assessed these switch charges. This assessment on carrier-owned cars was in accordance with the I.C.C. decision, *Use of Private Passenger Train Cars*, 155 I.C.C. 775, which held that carrier-owned cars moving on a foreign road must pay regular tariff charges if the movement is not a revenue move or a return empty move after delivery of a shipment. The Commission specifically mentioned repair movements as being subject to freight charges.

The Indiana Harbor Belt appealed the final Decision of the Interstate Commerce Commission to the District Court which had referred the question to the I.C.C. under the Administrative Procedure Act. The District Court reversed the Commission's decision on the grounds: (1) The decision, i. e. tariff interpretation, precipitated a violation of the anti-discrimination clause of the Interstate Commerce Act (Title 49, Sec. 2); (2) The Commission by its decision failed to perform its duty under Section 1 of the Act which obligates them to protect and promote the financial welfare of the transportation system (A4a).

As to ground (1), the District Court pointed out that the manner in which the tariff provisions were construed by the Commission had the effect of obligating the Indiana Harbor Belt to collect freight charges on carrier-owned cars moving to the repair plants while all private cars must be switched free of charge, thus creating a discrimination in violation of Section 2 of the Act which provides that all persons receiving the same transportation service be charged equally (A91a). As to the second ground, the Court

indicated that the tariff interpretation resulted in a substantial amount of free transportation to the car owners, and showed a failure on the part of the Commission to perform its duty to preserve, protect and promote the welfare of the railroads as set forth in the National Transportation Policy.*

The Interstate Commerce Commission and the car companies appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. The Appeals Court reversed the decision of the District Court, stating that the court took into consideration matters not properly before it, and on the issue that the Appeals Court deemed properly before it, i. e., the validity of the interpretation by the Commission of the tariffs involved, the Court erred (A13a). It concluded that the District Court could not declare the Commission's decision in violation of Section 2, and could not review the soundness of the Commission's determination and its conformity with the policy and provisions laid down in the National Transportation Policy. Further, it declared that the Court should have affirmed the Commission's interpretation of the tariffs, since the Commission alone had the expertise to reconcile the tariffs.

The Court also declined to review the record of the proceedings before the Commission or the opinion of the Commission, declaring it to be unnecessary.

Finally, the Appeals Court refused to consider the Indiana Harbor Belt's claim that the Interstate Commerce Commission decision, by compelling it to render free transportation service, constituted a denial of procedural and substantive due process under Amendment V of the Con-

* There were approximately 23,000 empty movements annually on the I.H.B. excluding empty movers going to or returning from a revenue movement.

stitution, on the ground that the Indiana Harbor Belt failed to introduce evidence showing its overall operations were materially affected by the decision.

REASONS FOR GRANTING THE WRIT

In reversing the District Court's decision in this case, the Court of Appeals found that the only issue properly before the District Court was whether the Commission erred in holding that the provisions of IHB Tariff 325-U fixing a rate for the movement of empty freight cars on their own wheels superseded under the general exceptions items 30(a) and 145(a)* of Maurer's Mileage Tariff 7, the specific provisions of items 25, 120, 140 and 260 of that tariff (A2a). It pointed out that the Commission's decision that the Mileage Tariff provisions superseded IHB Tariff 325-U was based on the canon of construction that a specific tariff rule takes precedence over a more general one, especially where application of the more general rule would nullify the tariff scheme involved in the specific rule. It cited *National Van Lines, Inc.* v. *United States*, 7th Cir., 1966, 355 Fed. 326, 332 in support. The Court further noted the Commission's interpretation of the

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* Items 30(a) and 145(a) are identical provisions, 30(a) applying to tank cars and 145(a) to other than tank cars; items 25 and 140 are identical, as are 120 and 260 on the same basis. The Petitioner has contended that the prefatory phrases "Except as otherwise provided herein . . ." in items 25 and 140; "Except as otherwise provided in items 25 and 30 . . ." in item 120; and "except as otherwise provided in tariffs of individual carriers lawfully on file . . ." in item 260, render these items contingent in application, whereas the Exceptions items (30 and 145) do not contain such phraseology, and are mandatory in character. Therefore, the Exceptions items prevail over the others and through them the IHB switching tariff applies (except in item 260 in which the tariff application is specifically mentioned by the phraseology which could call into play an individual carrier tariff directly).

tariffs was consistent with the rule of construction that ambiguous tariff language must be construed in favor of the shipper and against the carrier. In doing so the Court passed over the further holding in *National Van Lines, supra,* that a strict construction of the tariffs against the carriers should not be followed where such construction ignores a permissible, reasonable construction which conforms to the intentions of the framers of tariff *and avoids possible violations of the law.* Petitioner has always contended that its interpretation of the tariffs was reasonable and in line with both tariff framers' intentions and the law, whereas the Commission interpretation is not. The violation of law involved here is the rendering of free transportation to private parties without any statutory authorization. The framers of IHB Tariff 325-U intended to collect switching charges on all empty cars moving on their own wheels without exception, and the Indiana Harbor Belt had a legal obligation to collect them. There is no exemption from transportation charges in favor of private cars mentioned in the Interstate Commerce Act, notably Sections 1 (7) and 22 (1) which refer to this subject (A93a). In the absence of a specific provision exempting a particular class from transportation charges, none can be implied. This was the holding in *L. & N. RR* v. *U. S.,* 282 U.S. 740, and in *KCS Ry.* v. *U. S.,* 282 U.S. 760. In addition, Section 15 (13) of the Interstate Commerce Act (A92a) carries no provision for free transportation of privately owned cars, but provides instead for payment by the carriers for the use of these cars. Mileage Tariff 7 is intended to be an implementation of this section. Therefore, the decision of the Appeals Court approving a tariff interpretation compelling free transportation for privately owned cars (especially where there is a valid tariff charge in effect) is in direct conflict with its own decision, *National Van Lines, supra*

(A78a), *L. & N. RR* v. *U. S., supra* (A56a), and *KCS Ry. Co.* v. *U. S., supra,* as well as the holding in *American Express Co.* v. *U. S.,* 1908, 212 U.S. 522 that only Congress has authority to authorize free carriage through appropriate legislation. Even such authorization so far enacted by Congress, has been permissive and not mandatory *Nashville, C & St. L. Ry.* v. *Tennessee,* 262 U.S. 318. These points were raised in the proceeding before the Interstate Commerce Commission, and the above decisions were cited in support, but the Appeals Court indicated it did not review the Commission record because it was unnecessary in their opinion. The Petitioner here contends the Appeals Court should have reviewed the record of proceedings before the Commission in order to properly assess the correctness and legality of the Commission's final decision before approving it.

If the Appeals Court had reviewed the record, it might not have reversed the District Court's view that the Commission decision violated the law by creating a discriminatory situation in violation of Section 2 of the Act where none existed previously. This very point was raised in the Commission proceedings by the Indiana Harbor Belt. The railroad pointed out that the Commission itself held that carriers must pay for empty repair moves of carrier-owned cars to and from repair shops off the home line, citing *Use of Passenger Train Cars,* 155 I.C.C. 775, 786, and therefore non-carrier owned cars must also bear the switch charge on empty repair moves to avoid a discrimination. The Commission had ample opportunity to make a specific finding on this point and they failed to do so. The tariff question was referred to the Commission by the District Court under the doctrine of primary jurisdiction, and the Commission rendered its decision pursuant thereto, choosing to ignore certain issues raised in the

proceeding, including the discrimination issue. Petitioner contends that the District Court, under the circumstances, rendered a decision consistent with its power to review a Commission decision and the underlying record. That a Court may declare a Commission decision in violation of the discrimination provisions in the Act, notably Section 2, is evidenced by the action of the Supreme Court in *United States* v. *Louisiana & P. R. Co.*, 1914, 234 U.S. 28, where this Court did exactly what the District Court did in the instant case. They declared that an order of the Commission in and of itself created a discrimination. This case was brought to the Appeals Court to no avail.

Finally, the Appeals Court refused to rule on the Constitutional issue raised by the appellant on the ground that the appellant did not make a showing that its over-all operations were impaired by the free service which the Commission decision requires it to render. They cite *Baltimore & Ohio RR* v. *United States*, 1953, 345 U.S. 146, 150. That decision relates to situations where the sole Constitutional issue is property taken for a *public* purpose without just compensation. Petitioner's case is property taken for a *private* purpose through an unreasonable and arbitrary decision of the Commission.

The issue is violation of procedural and substantive due process, and *B&O* v. *United States* at page 149 indicates such cases are distinguishable from those involving public use without just compensation. The Court there speaks of decisions and statutes which lack reasonable grounds for imposing non-compensatory rates on railroads. This case involves imposing the furnishing of free transportation to private corporations on a carrier without any legal authority or grounds for doing so, and therefore the impaiment of overall revenues is not germane, and a showing of impairment of overall revenues should not be required.

The Court should have considered the Constitutional issue under these circumstances.

This Court, insofar as Petitioner can ascertain, has never directly ruled on the question whether privately owned cars are entitled to free transportation under the Interstate Commerce Act. The only interpretation of Section 15 (13) of the Act found by Petitioner was that in *I.C.C.* v. *Diffenbaugh*, 222 U.S. 42, 46-47, where the Court defined the limit of the Commission's authority under 15 (13) to be that it may determine the maximum amount to be paid by a carrier to an owner of property transported for instrumentalities furnished by the latter.

CONCLUSION

We submit, therefore, that a Writ of Certiorari should be granted and that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM TARIFFS INVOLVED

1. NIB TARRIFF 325-U:

RATES IN CENTS PER 100 POUNDS (EXCEPT AS OTHERWISE INDICATED), APPLYING AT AND BETWEEN STATIONS SHOWN ON PAGE 2 HEREIN (EXCEPT AS OTHERWISE MODIFIED)

BETWEEN	AND	COMMODITY	RATES
Industries, Team Tracks and Junctions with Connecting Lines	Industries, Team Tracks and Junctions with Connecting Lines	All Commodities not otherwise specifically provided for.	$3.12 plus 2% $8.75 per car.
		Plant Refuse, of no commercial value to shipper and Refuse Waste Material or Excavated Material, of no commercial value to shipper, straight or mixed carloads	$31.13 per car.
		Railway Equipment on own wheels, viz.: Empty Freight Cars.	D$30.21 each.
		Baggage Cars. Ballast Spreaders Caboose Cars. Cranes. Derricks. Dining Cars Express Cars. Mail Cars Passenger Coaches Sleeping Cars Shovels, Power Snow Plows. Test Cars, Scale or Rail	$43.94 each.
		Locomotives (Dead or under Power) Locomotive Tenders. Locomotives and Tenders combined (Dead or under Power)	80% of actual weight, minimum 60,000 pounds, 7 cents per 100 pounds plus $8.25 per Locomotive.

2. MAURER'S MILAGE TARRIFF 7:

ITEM	APPLICATION
	Applies only on tank cars
25	The term "Cars of Private Ownership," when used in this tariff, supplements thereto or reissues thereof, is defined as cars owned by individuals, firms, corporations or car companies, including cars owned and/or operated by railroad controlled car lines. Except as otherwise provided herein, these rules govern the payment of mileage allowances and equalization of mileage on tank cars when used by railroads, parties to this tariff, individually or jointly where specifically provided herein), for transportation over their lines, including the movement to shops for repairs or reconditioning or returning therefrom, as follows: (A) Between points in the United States (interstate and intrastate) including movements where part of the through route is through the Dominion of Canada. (B) Internationally, i. e., between points in the United States and points in the Dominion of Canada. (Applicable only on that portion of the haul within the United States). (C, For that portion of the haul in the United States in connection with movements between points in the Dominion of Canada where part of the through route is through the United States.

EXCEPTIONS TO APPLICATION AND RULES

Applies only on tank cars

The rules and mileage allowances published herein, will not apply on the following:

(a) Movements of empty cars for which charges are assessed under tariff authority.

(b) Empty movement of new or newly acquired cars (See Rule 1) on order of the owner—(1) from point at which manufactured or newly acquired to the point at which they are first loaded, or to a home point (See Note) of the owner or of the party who has newly acquired the car, as shown by a change in the permanent reporting marks (See Rule 1); and (2) new cars not loaded but returned empty from home point or point to which billed for loading to original point of manufacture.

30 Note.—"Home Point" is defined as point at which owner's shop or track is located or any point where owner has contractual arrangements for construction, repairs to or storage of his equipment and provided such home point or points are published in the Official Railway Equipment Register at the time of movement.

(c) Movements of cars, the marked capacities and assigned reporting marks of which are not properly published in the Official Railway Equipment Register ICC-RER 365, The Railway Equipment and Publication Company, Agent, and the gallonage capacities of which are not published in WTL Tank Car Capacities Tariff 300-J, I. C. C. A-4626, except that the gallonage capacities of cars designed and used exclusively for handling of Commodities on which weights and charges are arrived at by weight and not by gallonage capacities of cars, need not be published in WTL Tank Car Capacities Tariff 300-J, I. C. C. A-4626.

EQUALIZATION OF MILEAGE ON TANK CARS

ITEM

Except as otherwise provided in Items 25 and 30 (Application and Exceptions to Application), tank cars will be moved empty without charge at the time movement is made between stations or junction points on the line of railroads parties to this tariff (either individually or jointly), including delivery to connecting lines, subject to the following conditions:

120

(a) Except as provided in Notes 2 and 3 below, should the aggregate empty mileage of cars bearing any of the reporting marks assigned to any one person or company at the end of each calendar year, or at the close of any such yearly period as may be mutually agreed upon, exceed the aggregate loaded mileage on the lines of such railroads, individually (or jointly when mileage accounts are computed jointly), such excess must be paid for by the person or company to whom the reporting marks are assigned, either by an equivalent loaded mileage during the succeeding six (6) months, or at applicable mileage rates named in the Consolidated Freight Classification, in the Uniform Freight Classification or in State Classification tariffs where State rates apply, or other applicable tariffs, without minimum, plus an amount equivalent to the mileage allowance that has been paid by the railroads on such excess empty mileage.

HANDLING OF CARS, ALSO EQUALIZATION OF MILEAGE

(For list of Carriers considered as one line, see Item 150)

ITEM

(a) Freight Cars, other than tank cars (see Item 120, Rule 3) will be moved empty without charge (except as otherwise provided in tariffs of individual carriers lawfully on file) either to the station or junction point where received under load or under instructions from car owners, to other stations, or for delivery to connecting lines.

260

(b) The following will apply only in connection with carriers shown in Item 1:

Should the aggregate empty mileage of any owners' cars exceed the aggregate loaded mileage, such excess must be paid for by the owner either by an equivalent loaded mileage, or at applicable mileage rates named in the Consolidated Freight Classification, in the Uniform Freight Classification or in State Classification tariffs, where State rates apply, without minimum, plus an amount equivalent to the mileage allowance that have been paid by the railroads to the owner on such excess empty mileage, whenever the excess empty mileage warrants such action.

Under this rule, private cars of different classes may not be combined in one equalization account. Separate equalization accounts must be kept for each class of equipment.

3. UNIFORM FREIGHT CLASSIFICATION TARRIFF 6:

		†Rates in Cents per Car per Mile	
		See Note 10, Item 81415-B	See Note 11, Item 81416-A
	RAILWAY EQUIPMENT OR MATERIAL, see Note 1, Item 80836 (Subject to Item 80835):		
81200-B	Cars, railway, moved on own wheels, see Notes 6, 7, 8 and 9, Items 81411-B to 81414-B, incl.:		
81210-B	Air brake instruction, consisting of passenger car equipped with standard air brake appliances with operative sets to illustrate the operation and detail construction	64½	75
81250-B	Armored, with or without racks, bins, shelves or shelving	54½	67
81230-B	Baggage, express or mail, nothe, or live stock, not slatted	44½	56½
[illegible]	Chair or passenger, nothe	64½	75
81260-B	Coach, nothe	54½	67
81250-B	Dining, parlor or sleeping, nothe	64½	75
81270-B	Box; caboose, eight-wheeled; flat, with fixed or stationary racks; covered hopper; live stock, slatted; or refrigerator or freight cars, nothe	22½	36½
81280-B	Caboose, four-wheeled	22½	36½
81290-B	Coal, coke, dump, flat, gondola or open top hopper	22½	36½
81295-B	Spray car, consisting of a box car, containing gasoline engine, pumps, spraying systems, tool bin, and all other equipment for spraying	22½	36½
81400-B	Tank	22½	36½
81410-B	Track scale testing	44½	56½
	†Not subject to Items X-199, X-208, X-212, nor X-223, except are subject only to Item 220 of Tariff of Increased Rates and Charges X-212 and Item 220 of Tariff of Increased Rates and Charges X-223 referred to in Items X-212 and X-223.		

81411-B Note 6—Unless otherwise provided:

APPLICATION OF CHARGES

(d) Lawfully established charges will be added for necessary bridge, ferry, switching or other initial, intermediate or terminal service of carriers over lines or sections of lines which are not used in connection with line-haul charges; for example, if the line-haul of a road includes the use of a bridge the length of which enters into the line-haul mileage, no charge for bridge service will be added, but if the length of the bridge does not enter into the line-haul mileage, the charge for bridge service will be added.

APPENDIX B

DISTRICT COURT OPINION

• • (Civil Action No. 70 C 492) • •

MEMORANDUM OPINION

This controversy began with the filing of two suits in this court in March 1970 by Indiana Harbor Belt Railroad Company ("IHB") to collect switching charges outstanding against General American Transportation Company (*Indiana Harbor Belt R.R. Co.* v. *General American Transportation Co.*, 70 C 491) and against North American Car Corporation (*Indiana Harbor Belt R.R. Co.* v. *North American Car Corp.*, 70 C 492), for switching empty privately owned tank cars to and from car repair plants owned by the defendants and located on the Indiana Harbor Belt R.R. Co. The car companies not only denied liability, claiming that the tariff charge assessed by the railroad under its tariff was inapplicable, unreasonable, and unlawful, but also filed counterclaims for refund of similar charges assessed and collected by respondent IHB during the same period on empty privately owned freight cars, other than tank cars, switched to and from repair facilities. The two car company defendants then moved to stay the court actions and refer the issues to the Interstate Commerce Commission for determination. Pursuant thereto, the defendants ("petitioners") filed with the Commission a declaratory order in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §554, for consideration of the issues. In July, 1971, a Commission examiner issued a report and recommended order concluding that IHB's

charges were applicable to the movement in question, and that the charges were not unjust or unreasonable.

The car companies filed exceptions to this decision to Division 2. In May 1972, Division 2 issued their report, and concluded that the charges collected and sought to be collected were inapplicable to the movements in question. This report entitled *Charges on Movements of Privately Owned Cars to and from Repair Shops on the Line of Indiana Harbor Belt Railroad Company,* is published at 341 I.C.C. 57.

IHB initiated a third lawsuit, this time against the United States and the Interstate Commerce Commission (73 C 114), to set aside and annul this final Commission determination. Since the ruling in this third lawsuit is dispositive of the issues in the suits against General American Transportation Co. (GATX) and North American Car Corp. (NAC), the three suits are consolidated herein for a ruling on the merits.

Respondent IHB is a belt carrier operating in the Chicago, Ill., switching district. Its switching movements are varied For example, IHB switches loaded and empty cars between approximately thirty line-haul carriers and industries located on its tracks. It switches loaded and empty cars handled in overhead traffic between line-haul carriers, and empty cars to and from seven repair facilities located on its tracks. Two of such repair shops are owned and operated by General American and one by North American, these two companies numbering among the largest manufacturers and lessors of freight cars, including tank cars.

The standard local switching charge was published in respondent's tariff 325 series. The tariff in effect at the time of filing of the court actions was designated IHB tariff 325-U, I.C.C. No. 1160 (superseded by a subseqnent issue of the tariff on January 1, 1971, not here relevant).

The charge assessed for this service was $20.21 per car, but no charge was assessed on empty freight cars switched between line-haul carriers and industries preceding or following a loaded movement, or, as previously stated, on empty tank cars switched to and from repair shops. IHB alleges that the omission to charge for this latter service was an oversight; their attempt to retroactively collect this charge the past 3 years resulted in the lawsuit and counterclaim already described.

The dispute between the parties relates initially to the proper interpretation of Maurer's Mileage Tariff 7, I.C.C. No. H-32 (Mileage Tariff 7). The issues are directed to Items 25, 30, and 120 of Sec. 1 of Mileage Tariff 7, and Items 140, 145, and 260 of Sec. 2 of that tariff. (Throughout the opinion, reference will be made only to Items 25, 30, and 120 dealing with tank cars. The discussion, however, is equally applicable to other freight cars since Items 140 and 145 of Sec. 2 contain language virtually identical to Items 25 and 30. Item 120 of Sec. 1 and Item 260 of Sec. 2 differ only in that Item 120 provides for free moves at the time of movement, subject to equalization of loaded and empty mileage, whereas Item 260 provides for free moves without restriction.)

Item 25 of Mileage Tariff 7 provides in pertinent part:

> Except as otherwise provided herein, these rules govern the payment of mileage allowances and equalization of mileage on tank cars when used by railroads, ... for transportation over their lines, including of movement . . . on the line of railroads parties to or returning therefrom . . . .

With regard to the movements covered by Item 25, Item 120 of the tariff describes the carrier's obligation in the following terms:

> Except as otherwise provided in Items 25 and 30 (Application and Exception to Application), tank

> cars will be moved empty without charge at the time of movement . . . on the line of railroads parties to this tariff . . . .

The position of IHB is that Item 30(a) excepts from application of the Mileage Tariff any movement of a private car for which a tariff charge exists. Item 30 provides, as pertinent:

> The rules and mileage allowances published herein will not apply on the following: (a) Movement of empty cars for which charges are assessed under tariff authority.

Therefore, since respondent published a switching charge in its own tariff. IHB No. 325-U, on all empty freight cars, it contends such tariff was applicable to the exclusion of the terms of Item 25. The descriptive item in connection with the switching charge was "Railway Equipment on own wheels, viz.: Empty Freight Cars."

Respondent interprets Item 30(a) to mean that the rules and the payment of allowances ordinarily applicable to private cars are inapplicable when one of these cars is transported by a carrier on a movement which is neither a revenue move nor a return empty move from a revenue haul. All other movements, it is claimed, are subject to the proper tariff charge. Petitioners object to this interpretation, stating item 30(a) refers to commercial shipments of empty cars only. They further contend that in any event, movements to car shops for repairs are to be moved free of charge in accordance with Items 25 and 120 of the Mileage Tariff.

The case is complicated by the fact that none of the railroad companies have behaved over the years in a manner consistent with theories which they are now propounding The complete disregard of the applicable provisions with respect to the movement of the privately-

owned tank cars and the observance of the tariff in connection with privately-owned cars other than tank cars is perplexing. Additionally, and not surprisingly, all parties are able to spew forth conflicting "normal rules of tariff interpretation" to support their contentions. For example, petitioners cite the principles that ambiguous tariff provisions must be construed against the carrier and in favor of the shipper; e.g, *Norwich Wire Works, Inc.* v. *Boston and M. R.*, 232 ICC 593, 596 (1939); *Atlantic Coast Line R Co.* v. *Atlantic Bridge Co,*. 57 F. 2d 654, 656 (5th Cir. 1932); and that exceptions to a tariff's general application provision must be clear and specific in order to be effective; e.g., *Conn Celery Co.* v. *A.C.L R.R.*, 292 ICC 761, 765; *Durez Plastics & Chemicals, Inc.* v. *CM St. P. P. R. Co.*, 259 ICC 335, 338. Respondent suggests, however, that "despite repeated findings to the effect that tariff ambiguities must be resolved against the framer of the tariff, this principle may not be successfully invoked where, in a given issue, there is a total absence of rates," *Buckeye Cotton Oil Co.* v. *A. & S. Ry. Co.*, 157 ICC 657, 658; and that "in construction of railroad tariffs, effect must be given, if possible, to every clause and sentence thereof. Specific provisions qualifying and supplying exceptions to the general provisions thereof are to be retained and given effect where possible." *Harrison Eng. and Construction Corp.* v. *A. T. & S. F. Ry.*, 78 F. Supp. 906, 912.

Clearly, these kind of principles, while occasionally helpful, are of greatest use when a court has already determined what the result in a given case shall be. However, this fact situation—at least as explored superficially—is one in which good judgment could favor either contestant. When such a situation arises, it is essential to view the Items in suit in the larger perspective of their

inter-relationship to the entire scheme of railroad charges and tariffs. In this regard we find the report of the Hearing Examiner particularly well-reasoned and persuasive. The consequences of the decision in this case must be reviewed in light of the purposes of the Interstate Commerce Act:

> to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . . all to the end of developing, coordinating and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the National Defense. All provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. 49 U.S.C. § 1

The Hearing Examiner is particularly mindful that IHB is a switching line; it does not participate in line-haul rates and, consequently, does not share in any of the revenue derived therefrom by the line-haul carriers. This distinction is constantly glossed over by the Division 2 report, and it is a distinction which severely weakens the foundation upon which much of their precedent rests. As the Report of the Hearing Examiner, p. 14, notes:

> This is a factor which distinguishes the considered movements of empty cars from those movements reviewed by the Commission and the courts in the cited proceedings. It is a significant difference. Line-haul carriers that perform like switching of empty private cars for repairs, as a part of the empty return move-

ment do have at least the benefit of the revenue derived from the movement of that car when loaded with shippers' freight, but there is no revenue to offset the cost to the switching carrier for performing this service. . . . .

Since no revenue is produced by the considered switch movements and, contrary to petitioner's allegations, the line-haul freight charges are not shown to include a cost factor for all such extraordinary movements, there is no basis for assessing the cost thereof against the line-haul carriers that interchange the privately owned empty cars with the respondent. The charges paid by shippers using a privately owned car for the movement of their freight does include a factor for the return of the empty car but not for all subsequent movement of the empty car. The cost of the switch movement to and from the repair shops performed by the respondent is properly chargeable to the car owner, carrier or non-carrier, who receives the benefit of the service. The record here shows that charges for switch movements to and from repair facilities are assessed against carrier owned cars and there is no sound basis for concluding that a different course of action should be followed in connection with non-carrier owners of cars. The petitioning car owners collect mileage allowances for the use of the privately owned cars by the railroads and it is not unreasonable to require that they assume the cost of the extraordinary movements to and from their repair facilities when such movements are separate and distinct from the normal return of the empty car.

But this court would be remiss to end our discussion at this juncture, for, as we are reminded by petitioners,

our scope of review here is sharply restricted. *Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, 430 (N.D. Ill. 1966), aff. 385 U.S. 457 (1967). Once this court finds substantial evidence in support of the Commission's findings, it cannot go further and inquire into the soundness of the Commission's reasoning or the wisdom of the result. *Virginian Ry.* v. *United States*, 272 U. S. 658, 663, 47 S. Ct. 222, 71 L. Ed. 463 (1926). Nonetheless, we have a recognized obligation under 5 U.S.C. §706 (2)(A), to set aside agency conclusions found to be "otherwise not in accordance with the law." In this instance, we find that the conclusions reached by Division 2 precipitate a violation of Sec. 2 of the Act, which prohibits and declares unlawful any unjust discrimination by a common carrier. The discrimination arises in that charges for switch movements to and from repair facilities are assessed against carrier-owned cars, whereas the Commission concludes, without adequate basis, that a different course of action obtains in connection with non-carrier owner of cars.

In *Use of Private Passenger Train Cars*, 155 ICC 775, 786, the Commission states:

> Freight cars in regular service are not subject to transportation charges but such cars are subject to charges when the transportation is not in regular service. The consolidated classification provides certain charges per car per mile for the transportation of all kinds of railway equipment on their own wheels. . . . These charges apply on new cars moving from the place of manufacture to the home line before being placed in service, *also on cars moving empty to and from repair shops off the home line*, and on any other movements over foreign lines not in regular service. (emphasis added)

The Commission argues that a repair move is an incident to transportation justifying exemption from any charge. But as IHB notes, this is inconsistent with the fact that empty repair moves of freight cars owned by other railroads which come into these plants and which are also instrumentalities of transportation are subject to the switch charge in Tariff 325-U. *Use of Private Passenger Train Cars supra,* clearly states that repair moves of cars of one carrier over the tracks of another is for the benefit of the carrier owning the car, and hence subject to freight charges. It seems clear, particularly in light of Section 2 of the Interstate Commerce Act, that the same must hold true of repair moves of privately-owned cars coming on the line of a carrier that does not use or have any interest in those cars and does not derive any revenue from them.

The court concludes that the findings and conclusions of Division 2 of the Commission result in a violation of 49 U.S.C. §2, and are otherwise unsound in respect to implementing the declared policy of the Interstate Commerce Act as set forth in 49 U.S.C. §1. Judgment is entered in favor of plaintiffs and against defendants in lawsuit 73 C 114; by agreement of the parties, the other two lawsuits are dismissed without prejudice to any defenses, especially to a defense of the Statute of Limitations, with leave to reinstate the actions upon notice as a matter of course.

Enter:

/s/ Abraham Lincoln Marovitz
Judge

Dated: November 7, 1973

APPENDIX C

COURT OF APPEALS OPINION

Nos. 74-1031 and 74-1101

Indiana Harbor Belt Railroad Company,
Plaintiff-Appellee,

v.

United States of America, Interstate Commerce Commission, General American Transportation Corporation and North American Car Corporation,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—

No. 73 C 114

Abraham Lincoln Marovitz, *Judge.*

Argued November 8, 1974 — Decided February 11, 1975
Before MARIS* HASTINGS and TONE, *Circuit Judges.*

MARIS, *Circuit Judge.* This is an appeal from a judgment of the district court setting aside an order of the Interstate Commerce Commission made by its Division 2. *Charges on Movements of Privately Owned Cars To and From Repair Shops on the Line of Indiana Harbor Belt R.R.*, 1972, 341 I.C.C. 57.

The controversy out of which the case arose has to do with the applicability of Freight Tariff 325-U, I.C.C. No.

* Of the Third Circuit, sitting by designation.

1160, of Indiana Harbor Belt Railroad Company, herein referred to as IHB, to certain empty car movements of the defendants, General American Transportation Corporation and North American Car Corporation, herein referred to as the Car Companies. IHB, a belt carrier, operates a short line of railroad in the Chicago, Illinois, switching district and performs various types of switching movements for its 30 connecting line-haul carriers as well as for industries located on its tracks and also switches empty cars to and from seven repair facilities also located on its tracks. The controversy began when IHB sought to collect certain charges from the Car Companies under Tariff 325-U. IHB claimed that it had previously unaccountably failed to bill and collect charges for the movement of empty tank cars owned by the Car Companies into and out of repair shops, although it had collected from them charges under that tariff for the similar movement of empty freight cars other than tank cars.

The Car Companies are manufacturers of freight cars which sell or lease such cars to shippers moving their goods over IHB and other lines and which also own three of the seven repair shops on the IHB line. They refused to pay the charges, denying the applicability of IHB Tariff 325-U not only to the tank car movements for which payments had not been made but also to the movements into and out of repair shops of other empty freight cars for which they now claimed they had mistakenly paid in the past. To enforce its claims IHB brought two separate suits, one against each Car Company,[1] in the district court to recover the amounts which

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[1] *Indiana Harbor Belt R.R.* v. *General American Transportation Co.*, N.D. Ill. 1970, Civil Action No. 70 C 491, and *Indiana Harbor Belt R.R.* v. *North American Car Corp.*, N.D. Ill. 1970, Civil Action No. 70 C 492.

it claimed as charges for switching empty tank cars to and from repair shops during the prior three years. The Car Companies thereupon counterclaimed, as defendants in their respective suits, for the sums which they had previously paid to IHB for the switching of empty freight cars other than tank cars to and from repair shops.[2]

Recognizing the primary jurisdiction of the Interstate Commerce Commission in this matter of applicability of rates, the district court, upon motion of the Car Companies, ordered a stay of its proceedings to allow either party to apply to the Commission for a ruling on the applicability and the lawfulness, if applicable, of IHB Tariff 325-U to the movements in question of defendants' cars. Accordingly, the Car Companies jointly petitioned the Commission for a declaratory order under the Administrative Procedure Act, 5 U.S.C. § 554, that the movements of empty tank cars and other empty private freight cars were subject to items of Agent B. B. Maurer's Mileage Tariff 7, I.C.C. No. H-32, generally providing that such movements are to be made free of charge and that IHB's interpretation of Maurer's Mileage Tariff 7 permitting revenue billing on the empty movements of private freight cars to repair shops would result in an unreasonable, unjust and discriminatory practice in violation of the Interstate Commerce Act.

The purpose of Maurer's Mileage Tariff 7[3] will be briefly explained. Ordinarily, railroads furnish the cars

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[2] The Car Companies also counterclaimed for sums which they paid for the movement of tank cars when IHB threatened to discontinue the service in question if payment were not made.

[3] Maurer's Mileage Tariff 7 was cancelled and replaced January 1, 1971 by Maurer's Mileage Tariff 7-B, I.C.C. No. H-43.

which shippers require to transport their merchandise. However, a shipper may use his own cars for this purpose or lease them from a private car company. Since the freight rates charged by the railroads to the shipper for moving his goods include a cost factor for supplying freight cars, such factor including car acquisition, maintenance and movement costs, the railroads should reimburse the shipper or car owner a reasonable amount when the shipper uses other than railroad cars. Maurer's Mileage Tariff 7 sets forth the rules governing the handling of and the mileage allowances to be paid on cars of private ownership by railroads party to the tariff, which include IHB and virtually all other American railroads. The purpose of these rules and allowances is to offset the charge to which we have referred which is included in the railroad freight rates for the use of carrier-owned cars. The offset is accomplished by a mileage allowance, paid by the railroad to the shipper using private cars or paid directly to the private car owner or lessor, for all miles traversed whether the car is empty or loaded except that if the aggregate of the empty miles exceeds the aggregate of loaded miles in an accounting period, the excess is subject to certain charges. This last provision is the so-called equalization rule set forth in items 120 and 260 of Maurer's Mileage Tariff 7. Subject to certain exceptions and to the equalization rule, items 120 and 260, however, generally provide that empty cars be moved free of charge.

The relevant portions of items 25, 30 and 120 of section 1 of Maurer's Mileage Tariff 7 are set out in the

margin.[4] Section 1 deals exclusively with tank cars. Section 2 dealing with freight cars other than tank cars contains in items 140, 145 and 260 provisions substantially identical in content with items 25, 30 and 120,

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[4] Item 25

APPLICATION

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Except as otherwise provided herein, these rules govern the payment of mileage allowances and equalization of mileage on tank cars when used by railroads, parties to this tariff, individually (or jointly where specifically provided herein), for transportation over their lines, including the movement to shops for repairs or reconditioning or returning therefrom, as follows:

• • •

Item 30

EXCEPTIONS TO APPLICATION AND RULES

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The rules and mileage allowances published herein, will not apply on the following:

(a) Movements of empty cars for which charges are assessed under tariff authority.

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Item 120, Rule 3

EQUALIZATION OF MILEAGE ON TANK CARS

Except as otherwise provided in Items 25 and 30 (Application and Exceptions to Application), tank cars will be moved empty without charge at the time movement is made . . . subject to the following conditions:

(a) Except as provided in Notes 2 and 3 below, should the aggregate empty mileage of cars bearing any of the reporting marks assigned to any one person or company at the end of each calendar year, or at the close of any such yearly period as may be mutually agreed upon, exceed the aggregate loaded mileage on the lines of such railroads, individually (or jointly when mileage accounts

respectively, of section 1. The switching charge imposed by IHB Tariff 325-U on the movement of empty freight cars which IHB is seeking to collect from the Car Companies is stated in the tariff to apply to "Railway Equipment on own wheels, viz.: Empty Freight Cars."

Upon submission of written testimony and briefs under its rules of modified procedure, the Commission referred the proceeding before it, to which IHB was made respondent, to a hearing examiner. The examiner considered the relevant portions of Maurer's Mileage Tariff 7 and concluded that the IHB charges under its Tariff 325-U for the movements of the empty cars in question into and out of repair shops fell within the exceptions stated in items 30(a) and 145(a) of the Mileage Tariff, were applicable to those movements and were not unreasonable or unlawful. In resolving the "slight conflict" between two "specific" provisions of the Mileage Tariff, items 30(a) and 120, in favor of IHB, the examiner stated that the possible ambiguity created by the language of the Mileage Tariff was removed by consideration of the particular circumstances that "IHB does not receive any share of the line haul assessed on loaded

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[1] *Continued*

are computed jointly), such excess must be paid for by the person or company to whom the reporting marks are assigned, either by an equivalent loaded mileage during the succeeding six (6) months, or at applicable mileage rates named in the Consolidated Freight Classification, in the Uniform Freight Classification or in State Classification tariffs where State rates apply, or other applicable tariffs, without minimum, plus an amount equivalent to the mileage allowance that has been paid by the railroads on such excess empty mileage.

• • •

movements passing over its line." The examiner also gave weight to the fact that IHB Tariff 325-U included a switching charge for empty car movements.

The Car Companies filed exceptions to the examiner's recommendations and the Commission, acting through its Division 2, thereafter issued a final report and order unanimously rejecting the report and order recommended by the examiner. The Commission concluded that item 25 of Maurer's Mileage Tariff 7, which specifically included the movement in question making the item 120 general provisions expressly applicable to car movements to shops for repairs, took precedence over the "vague and ambiguous" exceptions provision of item 30(a), and further that the language of IHB Tariff 325-U—"Railway Equipment on own wheels, viz.: Empty Freight Cars"—was not specific enough as to the kind of empty car movements covered to supplant, under the exception in item 30(a), the very specific language of item 25—"tank cars when used by railroads . . . for transportation over their lines, including the movement to shops for repairs or reconditioning or returning therefrom." The Commission took the view that the broad interpretation required by IHB's position that the mileage charge imposed by its Tariff 325-U fell within the exception of 30(a) would, when taken to its logical conclusion, result in the exception nullifying the mileage allowance tariff generally.

Upon the denial by the Commission of the petition of IHB to reconsider the order holding IHB Tariff 325-U inapplicable, IHB filed a third action in the district court, this one to set aside the Commission's determination. IHB complained that the Commission's order was arbitrary and capricious, that it was based on a misinterpretation of the law and evidence, that it conflicted with the plain language of the tariff items involved, that

it violated the Interstate Commerce Act in that it compelled the charging of discriminatory rates and also in that it compelled IHB to furnish free transportation since IHB does not participate in line-haul carrier freight rates, and that in the latter respect it violated the Fifth Amendment of the Constitution by ordering a confiscatory taking of the IHB property without due process. The Car Companies intervened as defendants, and the district court consolidated the three cases, since it concluded that its decision in the third suit would be dispositive of the issues in the two earlier suits against the Car Companies. The district court subsequently entered a judgment setting aside the determination of the Commission and dismissing the two suits brought by IHB against the Car Companies without prejudice to their later reinstatement. 1973, 368 F.Supp. 904. From the portion of the judgment which set aside the determination of the Commission appeals were taken by the Car Companies at our No. 74-1031 and by the Commission and the United States at our No. 74-1101.

The district court arrived at its conclusions by first noting that the practices of both IHB and the Car Companies in making and paying charges for empty car movements were inconsistent with their present claims. The court discounted the application of various rules of tariff interpretation which were urged upon it as either not dispositive in the circumstances of the case or as cancelling each other out. The court did concede that "this fact situation—at least as explored superficially—is one in which good judgment could favor either contestant", but proceeded to review the Commission's order "and the Items in suit in the larger perspective of their interrelationship to the entire scheme of railroad charges and tariffs." 368 F.Supp. at 907. The court

adopted the view of the Commission's examiner that the particular circumstances of IHB's situation should weigh the otherwise balanced scales in its favor. In the court's view, since the repair movements of carrier-owned cars over another carrier's tracks have been held by the Commission to be subject to charges, *Use of Private Passenger Train Cars,* 1929, 155 I.C.C. 775, the Commission's rejection of an interpretation of the tariffs which would allow IHB to assess a charge for repair movements of privately owned freight cars, would precipitate a violation of the anti-discriminatory provisions of section 2 of the Act.

We think, however, that the district court in reaching its decision took into consideration matters not properly before it and that on the issue which was properly before it, the validity of the interpretation by the Commission of the tariffs involved, the court erred. We are satisfied, in particular, that it was not within the province of the district court, in reviewing the determination of the Commission on this issue, to consider *ab initio* the question whether the application of the tariffs as interpreted by the Commission, would result in unlawful discrimination in violation of section 2 of the Interstate Commerce Act. 49 U.S.C.A. § 2. For it is settled that primary jurisdiction for determining whether rate charges are discriminatory lies with the Interstate Commerce Commission and not with the courts. *United States* v. *Wabash* R.R., 1944, 321 U.S. 403, 410-411. The inquiry involves the exercise of discretion in a technical field requiring the expertise of the Commission, whether it is conducted to determine if a party in the past has been wronged, a judicial function, or to determine what rate or practice shall be deemed reasonable in the future, a legislative function. *Great Northern Ry.* v. *Merchants Elevator Co.,* 1922, 259 U.S. 285, 291. That a body should exist fitted to make a

primary determination from the facts as to whether a preference or discrimination obtains was one of the reasons for the creation of the Commission. *United States* v. *Chicago Heights Trucking Co.*, 1940, 310 U.S. 344, 352. Thus the courts must enforce a rate, even though alleged to be discriminatory, until the matter of discrimination has first been decided by the Commission.[5] *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 1907, 204 U.S. 426, 439. Indeed one of the purposes of the Interstate Commerce Act is to provide an effective means to redress unjust discrimination through the publication of rates and their undeviating application subject to review and approval by the Commission.

Nor was it proper for the district court to review the soundness of the Commission's determination and its conformity with the policy and principles laid down in section 1 of the Interstate Commerce Act. 49 U.S.C.A. § 1. *Georgia Public Service Commission* v. *United States*, 1931, 283 U.S. 765, 775; *I.C.C.* v. *Martin Bros. Box Co.*, 9 Cir. 1955, 219 F.2d 811, cert. den. 350 U.S. 823. The courts may not substitute their judgment on these questions for the findings and conclusions of the Commission. *United States* v. *New River Co.*, 1924, 265 U.S. 533, 542.

We come then to the issue which was properly before the district court, namely, whether the Commission erred in holding that the provisions of IHB Tariff 325-U fixing a rate for the movement of empty freight cars on their own wheels superseded under the general exception of items 30(a) and 145(a) of Maurer's Mileage Tariff 7 the specific provisions of items 25, 120, 140 and 260 of that tariff that empty tank and other freight cars will

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[5] The Commission's decision on this question is, of course, subject to judicial review. *Pennsylvania R.R.* v. *United States*, 1960, 363 U.S. 202, 205.

be moved without charge to shops for repairs and return therefrom. We think that the reconciliation of these conflicting tariffs and the proper scope of each in view of the other was a matter peculiarly within the competence of the Commission to determine in the light not only of their language but also of all the customs, practices and other underlying facts involved. *United States* v. *Western Pacific R.R.*, 1956, 352 U.S. 59, 65-66, 68. To the Commission's determination of such a question the courts wil give great weight. *United States* v. *North Carolina Granite Corp.*, 4 Cir. 1961, 288 F.2d 232, 235.

The district court recognized that its scope of review was narrow but nonetheless reversed the Commission on the basis of the court's view of the proper operation of the tariff provisions involved in the larger perspective of their interrelationship to the entire scheme of railroad charges and tariffs, and of its conclusion that the Commission's interpretation would precipitate discriminatory practices in violation of section 2 of the Interstate Commerce Act. The court conceded that if one were limited to the face of the record alone good judgment could favor either view of the impact of the tariffs upon each other. With this conclusion we agree and we think that the court should have so limited its consideration of the Commission's order.

The conclusion of the district court to which we have just referred makes it unnecessary for us here to review in any detail the record or the opinion of the Commission. We may point out, however, that the Commission referred to the billing and payment practices of private car owners and carriers under tariffs similar to IHB Tariff 325-U, to the question whether the empty freight cars on their own wheels described in Tariff 325-U were to be considered as commodities or as instrumentalities

of commerce, and the meaning of the word "assessed" in items 30(a) and 145(a) of Maurer's Mileage Tariff 7. The Commission largely based its decision upholding the applicability of items 120 and 260 of that tariff on the canon of construction that a specific tariff rule takes precedence over a more general one, especially where, as here, the application of the more general rule would nullify the tariff scheme involved in the specific rule. See *National Van Lines, Inc.* v. *United States,* 7 Cir. 1966, 355 F.2d 326, 332. This interpretation of the tariffs was consistent with the rule of construction that ambiguous tariff language must be construed in favor of the shipper and against the carrier. *Calcium Carbonate Co.* v. *United States,* S.D. Ill. 1966, 256 F.Supp. 99, 102-103.

But little need be said of the claim of IHB that the Commission's order, by requiring it to perform a free service, has authorized the taking of its property without just compensation in violation of the Fifth Amendment to the Constitution. For IHB did not make the showing as to its over-all operations which was necessary to enable the court to consider such a claim. *Baltimore & Ohio R.R.* v. *United States,* 1953, 345 U.S. 146, 150.

Reversed.

APPENDIX D

I. C. C. EXAMINER'S REPORT

INTERSTATE COMMERCE COMMISSION

Served July 27, 1971

No. 35327

CHARGES ON MOVEMENTS OF PRIVATELY OWNED CARS TO AND FROM REPAIR SHOPS ON THE LINE OF INDIANA HARBOR BELT RAILROAD COMPANY

Decided .....

Upon petition for declaratory order, applicable charges on empty privately owned cars moving to and from repair shops on Indiana Harbor Belt Railroad Company determined. Applicable charges not shown to have been unreasonable or otherwise unlawful. Proceeding discontinued.

D. Robert Thomas, Martin M. Lucente, and *Ronald J. Sklar* for petitioners.

Robert H. Bierma, Richard O. Olson, and *Anna M. Kelly* for respondents.

REPORT AND ORDER

Recommended By Edward L. Boisseree, Hearing Examiner

By petition filed September 15, 1970, petitioners, General American Transportation Corporation, (GATX), and North American Car Corporation (NAC), seek a declaratory order under section 5(d) of the Administrative Procedure Act with respect to a controversy existing between petitioners and the Indiana Harbor Belt Railroad Company, (IHB), respondent. It was concluded that the matter presented was susceptible of handling under the modified procedure and the evidence was submitted, as directed by the Commission, under that procedure. Thereafter, the proceeding was referred to the Hearing Examiner for the recommendation of an appropriate order thereon, accompanied by reasons therefor.

The instant proceeding results from action taken by IHB to collect freight charges from GATX and NAC for the movement of empty privately-owned tank cars to and from repair facilities on its lines. Two suits were instituted on March 2, 1970, in the U.S. District Court for the Northern District of Illinois seeking a judgment against the petitioners for money allegedly due under IHB Tariff 325-U, I.C.C. No. 1160, (Tariff 325-U), for the movements over the prior three years of tank cars owned by petitioners to and from their repair shops located on on the IHB. The petitioners denied liability for such charges and filed counterclaims seeking recovery of freight charges paid on movements of the tank cars since the date when respondent began to construe the indicated tariff as being applicable to such movements. They also sought recovery by counterclaim of charges allegedly mistakenly paid on movements of other freight cars to and from their repair facilities. With the counterclaims, the peti-

tioners also filed a motion to stay proceedings in the two actions pending reference of the issues of tariff interpretation and reasonableness of the charges to this Commission. The motion was granted in both cases and the instant proceeding was initiated pursuant to the orders entered by the Court.

GATX and NAC are two of the largest manufacturers and owners of private freight cars. These cars are leased to thousands of shippers throughout the country and operate over the lines of virtually all of the nation's interstate railroads. The IHB is a belt line located in the Chicago Switching District. It has direct connections with about 30 railroads, mostly line-haul. The IHB transfers cars loaded and empty between line-haul carriers. These line-haul carriers pay a switch charge to the IHB for each car handled in overhead traffic whether loaded or empty. In addition, traffic is delivered to or originated at industries located on the IHB which is received from or tendered to a connecting line-haul carrier. A switch charge is assessed on the loaded haul, and is either paid by the industry or absorbed by the connecting carrier receiving the line-haul. No charge is made for returning an empty car to the line-haul connection after it is unloaded or where an empty is brought in from the connection to the industry for loading.

There are seven car repair plants located on the IHB. Two are owned and operated by GATX and one by NAC.[1] These plants service tank cars, refrigerator cars and other types of railway freight cars. Some of the cars are owned by the car companies operating the repair plants, some are railroad owned cars, and the remainder are privately

[1] Other repair plants are owned and operated by U.S. Railway Equipment Co., the Pullman Co., Union Tank Car Co., and O.F. Jordan Co.

owned by others. For the year ending December 31, 1970, there were approximately 22,151 movements of empty cars on the IHB exclusive of the empty cars sent in for loading or returning to connections after unloading and exclusive of empty cars moved in overhead traffic. The IHB assessed its local rate for these movements. Between 2,000 and 3,000 of the 22,151 movements were empty tank cars moving in and out of the repair plants. The balance were other than tank cars moving to and from the repair facilities or cars being returned to connections because of unfitness for loading or cars rejected by shippers for other reasons. Most of the privately owned cars for repairs come to the IHB from its line-haul connections and are returned to them after servicing. The standard local switch charge of $20.21[2] has been assessed pursuant to Tariff 325-U, for such movements except on tank cars. The failure to assess the charge on the tank cars was allegedly an oversight which was corrected by the submission of bills for outstanding charges and led to the Court actions previously described.

As stated, the IHB has moved empty privately-owned tank cars of the petitioners to and from the repair facilities of these companies without charge. This was pursuant, according to the petitioners, to the provisions of Maurer's Mileage Tariff 7, I.C.C. No. H-32 (Mileage Tariff 7). When IHB commenced billing petitioners for freight charges on such movements the car companies refused to pay, and the respondent refused to make additional movements without prepayment of the disputed charges. Petitioners then made the payments of the billed charges under protest. After a review of the governing tariffs, the

[2] Subject to general increases authorized subsequent to June 1, 1969.

petitioners concluded that the charges they had been paying on movements of privately-owned cars other than tank cars were inapplicable and unlawful and, as noted, included such charges in the counterclaims in the described court actions and also presented the issue in the instant petition.

The dispute between the parties relates initially to the proper interpretation of Mileage Tariff 7 which governed the handling of and payment for private freight cars until January 1, 1971 when it was superceded by a subsequent issue of the Tariff, and, also, to the question of the applicability of Tariff 325-U which publishes freight charges on empty freight cars. The specific issues are first, whether the tariff provisions impose a charge on the movement of empty privately-owned cars to and from repair facilities located on the line of the IHB, and, second, if the tariff provisions do impose charges, are such charges reasonable and lawful.

It is the position of GATX and NAC that the equalization rule of Section 1 (item 120) and item 260(a) of Section 2 of Mileage Tariff 7, rather than the freight charges under Tariff 325-U are applicable to the considered movements. They further contend that should the charges in the latter tariff be found to be applicable to these car movements that such charges are unreasonable and unlawful in contravention of section 1 of the Act.

The parties agree that the tariff interpretation issues are directed to items 25 and 30 of Section 1 of Mileage Tariff 7 and the identical language contained in items 140 and 145 of Section 2 of that tariff as well as Tariff 325-U. Section 1 of the Mileage Tariff relates to tank cars and Section 2 relates to all other private freight cars. Item 25 reads as follows:

APPLICATION

Applies only on tank cars

The term "Cars of Private Ownership," when used in this tariff, supplements thereto or reissues thereof, is defined as cars owned by individuals, firms, corporations or car companies, including cars owned and/or operated by railroad controlled lines.

Except as otherwise provided herein, these rules govern the payment of mileage allowances and equalization of mileage on tank cars when used by railroads, parties to this tariff, individually (or jointly where specifically provided herein), for transportation over their lines, including the movement to shops for repairs or reconditioning or returning therefrom, as follows:

(A) Between points in the United States (interstate and intrastate) including movements where part of the through movements is through the Dominion of Canada.

(B) Internationally, i.e., between points in the United States and points in the Dominion of Canada. (Applicable only on that portion of the haul within the United States).

(C) For that portion of the haul in the United States in connection with movements between points in the Dominion of Canada where part of the through route is through the United States.

Item 140 in Section 2 of the tariff contains identical language except that it refers to cars other than tank cars.

Item 30 of the same tariff reads as follows:

EXCEPTIONS TO APPLICATION AND RULES

Applies only on tank cars

The rules and mileage allowances published herein will not apply on the following:

(a) Movements of empty cars for which charges are assessed under tariff authority.

(b) Empty movement of new or newly acquired cars (See Rule 1) on order of the owner—(1) from point at which manufactured or newly acquired to the point at which they are first loaded, or to a home point (See note) of the owner or of the party who has newly acquired the car, as shown by a change in the permanent reporting marks (See Rule 2); and (2) new cars not loaded but returned empty from home point or point to which billed for loading to original point of manufacture.

Note.—Home Point is defined as point at which owner's shop or track is located or any point where owner has contractual arrangements for construction, repairs to or storage of his equipment and provided such home point or points are published in the Official Railway Equipment Register at the time of movement.

(c) Movements of cars, the marked capacities and assigned reporting marks of which are not properly published in the Official Railway Equipment Register ICC-RER, The Railway Equipment and Publication Company, Agent, and the gallonage capacities of which are not published in WTL Tank Car Capacities Tariff 300-J, I.C.C. A-4626, except that the gallonage capacities of cars, designed and used exclusively for handling of Commodities on which weights and charges are arrived at by weight and not by gallonage capacities of cars, need not be published in WTL Tank Car Capacities Tariff 300-J, I.C.C. A-4626.

The language of item 145 is identical in all significant respects.

IHB takes the view that Items 30(a) and 145(a) except from application of Mileage Tariff 7 any movement of a private car for which a tariff charge exists with the exception of loaded revenue movements and empty return movements. Since Tariff 325-U provides a tariff charge, $20.21 per car on all empty movements of freight cars, any such movement on the IHB, with the indicated exceptions, is excluded from the provisions of the Mileage Tariff and the collection of freight charges on movements of private freight cars to and from repair shops is mandatory.

The equalization rule (item 120 for tank cars and item 260 for other cars) in Mileage Tariff 7 provides, in part, "* * * should the aggregate empty mileage of cars * * * exceed the aggregate loaded mileage * * * such excess must be paid for * * * either by an equivalent loaded mileage * * * or at applicable mileage rates named in the Consolidated Freight Classification * * * or other applicable tariffs * * *."

INTERPRETATION OF THE TARIFFS

As stated, the first issue is the determination of the particular tariff provisions that have application to the considered movements. Petitioners contend that for many years items 30(a) and 145(a) have been interpreted to mean only that the mileage allowance and equalization provisions will not be applicable to movements of empty private cars which have no relation to the transportation functions of the car. If the empty movement is related to the transportation functions of the car, then these parties concede that the car is considered to be moving as an item of freight and is subject to lawful freight charges. However, if the particular movement is covered by Mileage Tariff 7 freight charges are not applicable and, according

to petitioners, the movement of the privately-owned cars to shops for repairs or reconditioning or returning therefrom are properly included in the mileage allowances and rules of the Mileage Tariff.

The respondent urges that the described item 30(a) clearly excludes the considered movements of the empty privately-owned cars from the application of the Mileage Tariff. According to the carrier, the individual circumstances determine the character of the movement and that is the reason why item 30(a) is worded in such general language. It is asserted that the item is not ambiguous and that the switching of the privately-owned cars by IHB between connecting line-haul carriers and the car repair plants on its lines are within the ambit of item 30(a) for which a charge is assessed under Tariff 325-U.

It is essential in determining the governing tariff provisions to consider initially the basic elements or rules for interpreting such provisions. Under accepted precedent, tariffs should be interpreted (1) to effectuate the intention of those responsible for its publication, (2) to follow the practical application of all the parties, and (3) in doubtful cases, in favor of the shipper since they are drafted by the railroads. See *National Van Lines, Inc.* v. *United States,* 355 F. Supp. 2d 326.

Here, the dispute is complicated by the fact that the respondent for many years has assessed and collected its published switching charge for the movement of privately-owned cars, other than tank cars, to and from the repair plants on its line, while contemporaneously transporting the privately-owned tank cars without charge under the equalization rule of the Mileage Tariff. This practice has been followed with the concurrence of the petitioners despite the fact that the tariff provisions applicable to

both movements, tank cars and other type cars, are substantially the same. In such circumstances it is not easy to determine the exact intention of the tariff publishers, nor to follow any practical application of the considered tariffs. Clearly, there is some confusion attending these tariff items but whether it reaches the point of creating a definite ambiguity which must be resolved in favor of the petitioners requires additional consideration.

It is necessary to start with the Mileage Tariff and with item 25 therein (as stated item 140 in the section relating to cars other than tank cars is the same) which provides, with emphasis added, in pertinent part *"Except as otherwise provided herein,* these rules govern the payment of mileage allowances and equalization of mileage • • • including the movement to shops for repairs or reconditioning or returning therefrom, • • •." The provisions are clear to this point but the qualification requires a further review of the tariff and an examination of the exceptions set forth in item 30 of the tariff (also item 145 with respect to cars other than tank cars). In this item, the rules and mileage allowances of the tariff are declared specifically inapplicable on particular movements which include in "(a) movements of empty cars for which charges are assesed under tariff authority". Here, is an expressed intention of the framers of the Mileage Tariff to exclude certain movements of empty cars but the broad language of the exclusion "for which charges are assessed under tariff authority," creates a need for additional search of tariffs to determine whether, in fact, any such charges for empty movements are assessed. In certain circumstances, it could be concluded that this broad language actually created an ambiguity because of the failure to specify with greater particularity the tariff authority in which charges for movements of empty cars are published. However, in

the instant case, the IHB does not receive any share of the line haul rate assessed on loaded movements passing over the Chicago, Ill., Switching District. It does receive its regular switching charge which is paid either by the connecting line-haul carrier or the shipper or consignee. In the circumstances the broad language of item 30(a), so far as movements over the IHB are concerned, creates no ambiguity with respect to the considered movements on the IHB. The respondent publishes charges for switching cars to and from points on its line and included therein is a charge for the movement of empty cars as described in its Tariff 325-U. Since such a charge is asssessed under tariff authority, the effect of item 30(a) is to exclude from the provisions of the Mileage Tariff the movements of empty cars. All of the movements under consideration herein relate to empty cars, admittedly privately-owned and destined to or originating at repair or reconditioning plants. Nothing in item 30(a) limits the term "empty cars" except in connection with tariff charges.

Petitioners contend that the purpose of the indicated item was to remove from the application of the Mileage Tariff the commercial movement of empty cars such as salvage or scrap movements or movements of cars used for storage, which do not qualify for payment of mileage allowances or movement without charge. The Mileage tariff, even when considered in its entirety, does not provide any basis for such a limitation of the provision of item 30(a). There is a slight conflict in connection with a specific provision in the Mileage Tariff which sanctions the movement of privately owned cars to and from the repair plants under the mileage allowances and equalization rule and another specific provision in the same tariff which excludes the movement of empty cars from such allowances when a tariff charge is published under other tariff authority.

The disparity does not, however, create an ambiguity which has the effect of canceling the provisions of item 30(a) in connection with the movement of privately-owned cars to and from points on the IHB. Under the normal rules of tariff interpretation the switching charge published in respondent's Tariff 325-U is applicable to the considered movements of petitioners cars to and from the repair facilities on the IHB.

REASONABLENESS OF THE APPLICABLE CHARGES

Whether the switching charges found applicable result in unlawful charges is the next issue in this complex proceeding. Questions relating to whether or not the considered movements are freight movements or the movement of "instrumentalities of transportation," or to the fact that the petitioners for many years have not paid any charges for the movement of their tank cars to the repair plants, are matters to be considered under section 1 of the act. The complete disregard of the applicable provisions with respect to the movement of the privately-owned tank cars and the observance of the tariff in connection with privately-owned cars other than tank cars is perplexing, and the record is free of any rational basis for such conduct by the petitioners and by the respondent. In any event, the instant controversy apparently originated with the investigation in *Mileage Allowances, Tank Cars,* 337 I.C.C. 23,[3] in which Division 2 of the Commission found that the Commission had jurisdiction under the Interstate Commerce Act to prescribe just and reasonable allowances

[3] In this proceeding, the respondent railroad sought to establish six levels of allowances, in addition to rules, regulations and charges on privately owned tank cars transported over their lines.

for use by railroads of tank cars furnished by shippers and concluded that the allowances proposed by the railroads were not shown to be just and reasonable. The division also concluded, in the same proceeding, that the charges proposed for moving empty tank cars, and the rules and regulations governing the use of privately owned tank cars were just and reasonable in part, but otherwise not shown to be just and reasonable. A structure of interim allowances was prescribed.

Petitioners' position that the assailed charges for the switching of privately owned cars to and from the repair facilities are unreasonable is predicated essentially on the argument that these are movements of instrumentality of transportation for which charges ought not be assessed. This is true, they say, because the maintenance of freight cars is a basic and integral part of the transportation service which the railroads are obligated to provide in connection with their published rates on commodities moving in privately owned freight cars. These published rates are assertedly designed to compensate the carriers for all the services they are obligated to perform, including furnishing a car reasonably suited for transporting the shippers' goods. Reliance is placed upon *Union Tank Car Co. Terminal Service,* 268 I.C.C. 338 (1947) in which it was concluded that privately owned tank cars used by the respondent railroads are instrumentalities of transportation and when the cars are temporarily withdrawn from transportation to undergo repairs they do not become property subject to transportation charges within the meaning of section 6(7). The railroad practices relating to the switching of carload freight and privately owned empty tank cars to, from, and between tracks of the Union Tank Car Company at North Baton Rouge, La., were found not unlawful.

In the proceeding cited in the preceding paragraph the

Commission seems to be saying that the provisions of section 6 have no application to the movement of the empty tank cars. Since the tariffs of the respondent in the instant proceeding, as concluded earlier herein, do publish a specific switching charge for the movement of empty freight cars to and from the described repair facilities, the petitioners assert it is an unlawful charge and they should not be required to pay it on the considered movements. Reliance is also placed by the petitioners on *Mileage Allowances, Tank Cars, supra,* wherein Division 2 stated at page 34 of its decision (334 I.C.C.):

> *Suggested substitute equalization rule.*—The respondents suggest a substitute equalization rule, which they believe complies with the examiners' guidelines. The substitute rule would permit free empty movement of tank cars only over the reverse of the loaded movements, making a charge of 10 cents for all other empty movements, with a refund provision for the amounts paid for movements to and from the repair shops. The refund would be paid the carriers performing the service and charged to the cost base in determining the allowance. However, the examiners suggested that the respondents should examine thoroughly the practicability of imposing some other form of discipline in controlling empty car movements, directed not toward routing repair movements or shipper-directed return movements, but toward lessor-directed car transfers. On this record, the proposed and substitute equalization rules have not been shown to be just and reasonable.

The foregoing finding assertedly requires the railroads to move privately owned freight cars to and from repair facilities without charge. Such finding, according to the

petitioners, does not violate either the Act or the Constitution and the railroads, including the respondent herein, accepted that conclusion by the subsequent filing of Mileage Tariff 7-B, effective January 1, 1971, which provided for such movements without charge. The relevant portions of the indicated tariff reads as follows:

> An empty car, after having been loaded in commercial service on which the railroads derived line haul revenue, will be moved without charge to and from facilities for lining, relining, modification, or repair upon surrender of a bill of lading endorsed with notation showing reason for such movement.

In further support of their position the petitioners refer to the Hearing Examiner's recommended report and order in docket No. 35130, *Applicable Tariff Provisions Regarding Freight Charges on New Empty Tank Cars—Illinois Central Railroad Company, et al.*, served November 6, 1970, in which it was concluded that the Mileage Tariff required "railroads in the past to transport new empty tank cars, or newly acquired empty tank cars, moving on their own wheels, as instrumentalities of transportation." The Hearing Examiner found that the application of ratings and mileage freight rates on such movements to be unlawful. Additionally, GATX and NAC refer to certain testimony presented in that proceeding by a railroad witness expert on cost analyses which purportedly establishes that the out-of-pocket cost of loaded movements of private cars included provision for the cost of making every empty movement of that car, and that a rate equal to the out-of-pocket cost would compensate the carriers for such empty movements. Accordingly, the Commission is asked to conclude in the instant proceeding that the movement of the privately owned freight cars to and from

the repair facilities of the petitioners is a movement of an instrumentality of transportation which carriers are obligated to make at the time of movement under their published line-haul freight rates and the additional charges assessed or sought to be assessed by the respondent are unjust and unreasonable.

Repondent urges that *Union Tank Car Co. Terminal Service, supra,* is not relevant to the instant proceeding. It directs attention to the fact that the movements in the cited proceeding were intra-terminal switch movements over short distances from a railroad freight yard of the carrier to a repair facility contiguous to the yard, and there was no specific tariff item applicable directly to empty cars moving on their own wheels. The movement of the empty cars under consideration here are inter-terminal and interline switches under a special tariff charge and these factors, respondent suggests, makes the cited proceeding an unfair standard for application herein. The carrier emphasizes that in every proceeding in which the Commission has made reference to free switching services, the situation presented related to switching by line-haul carriers. There is a vast difference, according to IHB, between a line-haul carrier that can recoup its switching cost on privately owned cars from the line-haul revenues obtained from the use of such cars, and a carrier which relies solely on switch revenues.

Reference is also made by respondent to *Mileage Allowances, Tank Cars, supra,* and to the concept of movement of empty cars without charge as "instruments of transportation." The latter theory should be discarded, or at least disregarded, in the instant proceeding for a number of reasons, according to respondent, particularly because it is the switching service for which a charge is made and the cost should be applied to all who use it even other

carriers. The IHB submits that in the proceeding just cited Division 2 prescribed certain guidelines for the future in connection with the equalization rule, and the decision should not be considered as controlling with respect to the past movements under consideration here. It stresses the necessity for the Commission to conclude that the switching charge in its Tariff 325-U is violative of some provision of the act before it can find the assessment of the charge on petitioners' movements as unjust and unreasonable, and the record is assertedly free of any showing upon which to base such a conclusion.

The IHB challenges the argument and underlying evidence from the examiner's report in Docket No. 35130 that the costs incurred by carrier in moving empty freight cars to and from repair facilities is part of the carrier's cost of transporting commodities carried in those cars and the carriers are obligated to make such movements under the line-haul rates on such commodities. It is respondent's view that the evidence relied on by petitioners was prepared only to show the expense incurred in moving a newly manufactured car from point of manufacture to point of first load, on an out-of-pocket basis and on a fully distributed basis, and has no application to the costing used for computation of regular commodity freight rates.

There are substantial sums of money at issue. GATX has a counter-claim for some $99,627.00 and NAC has one for $107,180.00 covering the movements of empty cars other than tank cars. As earlier stated, there are four other car companies with facilities located on the IHB who would be in a position to file for refunds for the movement of cars other than tank cars should the petitioners secure a favorable decision. A replacement of this revenue loss would be essential and the petitioners have urged that it should come from the line-haul carriers that connect with

the IHB. The latter, however, argues that these charges must be collected from the party directly benefiting from the services rendered and the line-haul carriers do not benefit from an empty non-revenue switch move such as the ones under consideration. The respondent, after directing attention to the fact that the petitioners are not shippers but non-revenue producing car owners, assert that it would be inequitable to add to the carriers' burden by permitting free switching service in addition to what the car owners receive in allowances.

Finally, the respondent contends that a ruling authorizing free service to petitioners on the considered movements would be in excess of the Commission's power under the act and would constitute the taking of property without due process of law in violation of the Constitution; further, that any provision of the act which the Commission finds requires free transportation services to private car owners is likewise null and void.

The issue of unreasonableness of the assailed switching charges, like the earlier one as to the applicability of the switching tariff, is complicated by the factual situation. Petitioners are not attacking the level of the charge. It is their view that a charge of any amount on the considered movements is unjust and unreasonable. Extended discussion of the numerous allegations and arguments of the parties, previously detailed herein, is unnecessary. The crucial point in the resolution of the reasonableness issue is whether the line-haul charges assessed shippers using the privately owned cars for the movement of freight embraces *all* movements of the private cars, loaded and empty, including the extraordinary movements to and from the repair facilities for reconditioning.

The Commission and the courts in the proceedings relied upon by petitioners *Union Tank Car Co. Terminal Service, supra,* and *Compensation for Transportation Services,* 332 I.C.C. 554, aff. in *Southern Railway Company* v. *United States,* 306 F. Supp. 108, lend support to their position. However, the key to these and other like decisions is provided in the following excerpt from the Commission report in the proceeding last cited at page 565:

> It is assumed that divisions of revenue derived from transporting loaded cars compensate for the movements of empties.

If that assumption is not correct the indicated precedent loses much of its validity. The IHB, as noted earlier, is a switching line. It does not participate in line-haul rates and, accordingly, does not share in any of the revenue derived therefrom by the line-haul carriers. This is a factor which distinguishes the considered movements of empty cars from those movements reviewed by the Commission and the courts in the cited proceedings. It is a significant difference. Line-haul carriers that perform like switching of empty private cars for repairs, as a part of the empty return, movement do have at least the benefit of the revenue derived from the movement of that car when loaded with shippers' freight, but there is no revenue to offset the cost to the switching carrier for performing this service. Petitioners are not unmindful of this aspect of the instant proceeding and, as stated, they urge that the IHB's recourse for payment of its switching service is not against them as car owners but rather against their line-haul connections who have allegedly received payment for costs sustained in these movements of the empty cars to and from the repair facilities when they collected the freight charges for the movement of the cars when loaded with freight.

Since no revenue is produced by the considered switch movements and, contrary to petitioner's allegations, the line-haul freight charges are not shown to include a cost factor for all such extraordinary movements, there is no basis for assessing the cost thereof against the line-haul carriers that interchange the privately owned empty cars with the respondent. The charges paid by shippers using a privately owned car for the movement of their freight does include a factor for the return of the empty car but not for all subsequent movement of the empty car. The cost of the switch movement to and from the repair shops performed by the respondent is properly chargeable to the car owner, carrier or non-carrier, who receives the benefit of the service. The record here shows that charges for switch movements to and from repair facilities are assessed against carrier owned cars and there is no sound basis for concluding that a different course of action should be followed in connection with non-carrier owners of cars. The petitioning car owners collect mileage allowances for the use of the privately owned cars by the railroads and it is not unreasonable to require that they assume the cost of the extraordinary movements to and from their repair facilities when such movements are separate and distinct from the normal return of the empty car. The switching charges published by respondent in its Tariff 325-U for movement to and from petitioners repair facilities are not shown to be unjust and unreasonable nor does the assessment of such charge constitute an unreasonable practice.

A final comment may be helpful in connection with respondent's assertion that findings requiring it to perform the described switching without charge at the time of movement would be violative of the due process and just compensation clauses of Amendment V of the United

States Constitution. This question was resolved in *B. & O. R. Co.* v. *U. S.*, 345 U.S. 146, wherein the Court ruled it is necessary for the carriers to show that the assailed regulation or rule cause them to lose money on their overall operations.

The Hearing Examiner finds that the switching charge published in IHB Tariff 325-U, I.C.C. No. 1160 was and is applicable to empty privately owned cars moving to and from car repair plants on the Indiana Harbor Belt Railroad Company during the period embraced in the actions before the U.S. District Court for the Northern District of Illinois; and that the said switching charge has not been shown to have been unreasonable or otherwise unlawful.

Accordingly, It is Ordered, That this proceeding be, and it is hereby discontinued.

It is further Ordered, That in the absence of a stay or postponement by the Commission, or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service of this order.

Dated at Washington, D.C., this 1st day of July 1971.

/s/ Edward L. Boisseree

By the Commission, Edward L. Boisseree, Hearing Examiner.

Robert L. Oswald,
Secretary.

(SEAL)

APPENDIX E

I.C.C. DECISION BY DIV. 3

INTERSTATE COMMERCE COMMISSION

No. 35327

CHARGES ON MOVEMENTS OF PRIVATELY OWNED CARS TO AND FROM REPAIR SHOPS ON THE LINE OF INDIANA HARBOR BELT RAILROAD COMPANY

Decided May 8, 1972

Upon petition for declaratory order, switching charges collected and sought to be collected on empty freight car movements to and from repair shops during a statutory period in the past found inapplicable, and proceeding discontinued.

Martin M. Lucente, Ronald J. Sklar, and D. Robert Thomas for petitioners.

Robert H. Beirma, Anna M. Kelly, and Richard O. Olson for respondent.

REPORT AND ORDER OF THE COMMISSION

Division 2, Commissioners Walrath, Bush, and Brown

BUSH, Commissioner:

Exceptions were filed by petitioners herein to the report and recommended order of the hearing examiner, and

respondent replied. Our conclusions differ from those of the examiner. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

This proceeding is the outgrowth of two actions filed on March 2, 1970, in a Federal district court,[1] by the respondent, Indiana Harbor Belt Railroad Company (IHB), against the General American Transportation Corporation (General American) and North American Car Corporation (North American) to collect rates allegedly due for switching empty privately owned tank cars to and from repair facilities during the prior 3 years. General American and North American not only denied liability for such charges on tank cars but filed counterclaims[2] for refund of similar charges assessed and collected by respondent during the same period on empty privately owned freight cars, other than tank cars, switched to and from repair facilities. The latter two parties also obtained orders from the court staying such actions until an administrative determination of the involved issues was obtained from this Commission. Pursuant thereto, on September 15, 1970, they (hereinafter referred to as petitioners) filed a petition for a declaratory order pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §554, to terminate the controversy or remove uncertainty.

We are concerned solely with privately owned freight cars, unless otherwise indicated. The issue involved is whether switching charges were applicable during the statutory period in the past on such empty freight cars

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[1] United States District Court for the Northern District of Illinois.

[2] The counterclaims involve approximately $99,000 by General American and $107,000 by North American.

(tank cars as well as other types of freight cars) switched to and from repair facilities by the respondent, or whether such movements should have been performed by respondent without charge. If switching charges were applicable, there is a further issue as to whether they were also lawful. The hearing examiner found that such charges were applicable but that they were not shown to have been unreasonable or otherwise unlawful. In view of our decision herein, we do not reach any issue with respect to the lawfulness of any tariff.

Respondent is a belt carrier operating in the Chicago, Ill., switching district and it performs various types of switching movements. For example, respondent switches loaded and empty cars between approximately 30 line-haul carriers and industries located on its tracks.[3] It switches loaded and empty cars handled in overhead traffic between line-haul carriers, and empty cars to and from seven repair facilities located on its tracks. Two of such repair shops are owned and operated by General American and one by North American.[4] Petitioners are two of the largest manufacturers and lessors of freight cars, including tank cars.

The standard local switching charge was published in respondent's tariff 325 series. The tariff in effect at the time of filing of the court actions was designated IHB tariff 325-U, I.C.C. No. 1160. At the Ex Parte No. 256 level, the charge was $20.21 per car. However, no charge was assessed on empty freight cars switched between line-haul carriers and industries preceding or following a

[3] Including bad-order cars rejected by shippers as unfit for loading and returned to the line-haul carriers or switched for repairs.

[4] Other repair shop operators are U.S. Railway Equipment Co., Pullman Co., Union Tank Car Co., and O. F. Jordan Co.

loaded movement, nor on empty tank cars switched to and from repair shops. In 1970, exclusive of overhead traffic and cars switched between industries and line-haul carriers, the respondent switched 22,151 empty cars, of which between 2,000 and 3,000 were empty tank cars moved to and from repair shops.

For years respondent did not collect switching charges on empty tank cars moved to and from repair shops, but it seeks to retroactively collect charges on such movements accumulated over the last 3 years. Petitioners at first refused to pay the charges but later made some payments under protest when respondent refused to perform additional switching. Respondent always assessed switching charges on other types of empty freight cars moved to and from repair shops and contends that it attempted to remedy the oversight in regard to tank cars by submission of the recent bills. It filed the court actions to collect the total amount of switching charges due during the statutory period. As heretofore indicated, by way of counterclaim, petitioners now dispute that charges collected during the statutory period on other types of empty freight cars moved to and from repair shops were applicable or lawful.

Movements of privately owned freight cars were generally governed by Agent B. B. Maurer's mileage allowance tariff 7, I.C.C. No. H-32 (hereinafter called the mileage allowance tariff),[5] to which most of the Nation's railroads were parties, including respondent. Section 1 governed tank cars and section 2 applied on all other freight cars. Hereinafter considered are the provisions of section 1, but the same conclusions with respect thereto

[5] Subsequently on January 1, 1971, it was canceled and superseded by Agent Maurer's tariff 7-B, I.C.C. No. H-43, which contains revised rules.

are applicable to identical provisions contained in corresponding items in section 2.

Pursuant to the equalization rule of the mileage allowance tariff, the railroads paid a mileage allowance on both empty and loaded miles to the car owner (or to the shipper-lessee of the car), and the car owner would, in turn, pay to the carrier charges based on mileage rates published in the Uniform Freight Classification for the number of empty miles not equalized by loaded miles. Empty cars considered to be moving as instrumentalities of transportation were moved without charge. The equalization rule set forth in item 120 of section 1[6] of the mileage allowance tariff was as follows:

Except as otherwise provided in Items 25 and 30 (Application and Exceptions to Application), tank cars will be moved empty without charge at the time movement is made between stations or junction points on the line of railroads parties to this tariff • • •

Item 25[7] referred to in the equalization rule provided, in part, the following:

APPLICATION

• • • • • • •

Except as otherwise provided herein, these rules govern the payment of mileage allowances and equalization of mileage on tank cars when used by railroads, parties to this tariff, individually (or jointly where specifically provided herein), for transportation over their lines, *including the movement to shops for repairs or reconditioning or returning therefrom* • • • [Emphasis added.]

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[6] In section 2, the equalization rule was in item 260(a).

[7] In section 2, the corresponding provisions were in Item 140.

Finally, item 30[8] was as follows:

EXCEPTIONS TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS

The rules and mileage allowances published herein will not apply on the following: (a) Movements of empty cars for which charges are assessed under tariff authority.

Respondent and petitioners interpret the provisions of items 25 and 30(a) differently, to support their particular positions. Respondent contends that item 25 permitted exceptions to application of the mileage allowance tariff by virtue of the phrase "Except as otherwise provided herein * * *." Individual circumstances, which justify an exception, were described in item 30(a), namely: when "charges are assessed under tariff authority." Therefore, since respondent published a switching charge in its *own* tariff, IHB No. 325-U, I.C.C. No. 1160, on all empty freight cars, it contends such tariff was applicable to the exclusion of the terms of item 25. The descriptive item in connection with the switching charge, which respondent seeks to collect, was "Railway Equipment on own wheels, viz.: Empty Freight Cars."

In opposition, petitioners contend that to so interpret item 30(a) would, in effect, render the entire mileage allowance tariff a nullity.[9] Further, they emphasize that the purpose of item 30(a) was only to except empty commercial movements from such provisions, not to eliminate

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[8] In section 2, it was item 145.

[9] There are rates in the Classification stated in cents per car per mile which, unless superseded by tariff provisions published elsewhere, would cover every piece of railway equipment moving on its own wheels.

empty miles by cars moved as instrumentalities of transportation.[10]

Although the examiner recognized some contradiction in the terms of items 25 and 30(a), he found in favor of respondent on the issue of applicability as follows:

There is a slight conflict in connection with a specific provision in the Mileage Tariff which sanctions the movement of privately owned cars to and from the repair plants under the mileage allowances and equalization rule and another specific provision in the same tariff which excludes the movements of empty cars from such allowances when a tariff charge is *published* under other tariff authority. The disparity does not, however, create an ambiguity which has the effect of canceling the provisions of item 30(a) in connection with the movement of privately owned cars to and from points on the IHB. Under the normal rules of tariff interpretation the switching charge published in respondent's Tariff 325-U is applicable to the considered movements of petitioners' cars to and from the repair facilities on the IHB. [Emphasis added.]

On exceptions, petitioners contend that the examiner erroneously characterized item 30(a) as excluding the movement of empty cars from allowances when a tariff charge is *published* under other tariff authority. However, petitioners allege that the only reasonable interpretation of item 30(a) is that its function is to prevent the applica-

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[10] The hearing examiner inadvertently misrepresented petitioners' position herein on page 6 of his report, which error they point out on exceptions. Their position should have been stated by the examiner as follows, with the ommission inserted and italicized:

> If the empty movement is *not* related to the transportation functions of the car, then these parties concede that the car is considered to be moving as an item of freight, and is thus subject to lawful freight charges.

tion of the equalization and allowance provisions of the mileage tariff to commercial movements on which the *published* general freight charges could properly be *assessed.* [Emphasis added.] Furthermore, what the examiner ignores as a "slight conflict" of no effect between these respective tariff items, leads him into making an anomalous finding that the terms of item 25, which specifically included cars moved to and from repair shops, were obviated by the vague provisions of item 30(a). Petitioners emphasize that although respondent concedes that item 30(a) did not exclude from the provisions of the mileage allowance tariff empty freight cars moved to and from repair shops by line-haul carriers, it nevertheless attempts to justify exclusion of similar movements by a switching carrier in a terminal area on the theory that individual circumstances determine which movements should be exempted. However, the language of item 30(a) contains no such distinction. Finally, petitioners refer to the current provisions in this regard in item 125 B 3 of the superseding mileage allowance tariff 7-B, I.C.C. No. H-43, as proof that it was always intended that no charge should be assessed on empty mileage to and from repair shops. The relevant provisions are as follows:

B. Empty tank cars will be handled as follows:

3. An empty car, after having been loaded in commercial service on which the railroads derived line-haul revenue, will be moved without charge to and from facilities for lining, relining, modification, *or repair* under surrender of a bill of lading endorsed with notation showing reason for such movement. [Emphasis added.]

Petitioners cite certain precedent in support of their position herein. In *Union Tank Car Co. Terminal Service,* 268 I.C.C. 338 (1947), it was determined that tank cars are instrumentalities of transportation and that they are not subject to transportation charges when temporarily

withdrawn from service for repairs. Line-haul carriers were respondents in that case, although the final switching to repair shops occurred in a terminal area.

In *Cancellation of Private Car Allowances,* 322 I.C.C. 565 (1964), sustained 279 F.Supp. 270 and affirmed 389 U.S. 88, it was decided that this same IHB status as a switching carrier did not relieve it from its obligation to pay a reasonable mileage allowance for shipper supplied cars. Thus, petitioners allege that, here, respondent is similarly attempting to avoid its responsibilities in using privately owned cars by imposing switching charges on the considered empty movements.

In *Mileage Allowances, Tank Cars,* 337 I.C.C. 23, 57 (1970), it was concluded, among other things, that ordinary repairs are an unavoidable incident to the performance of transportation by the use of privately owned freight cars and that it would be inappropriate to subject such empty mileage to freight rates. That report also indicated which empty movements of freight cars may be considered as within the scope of an instrumentality of transportation, and included therein, among other types of movements, were those to and from repair shops.

Discussions and Conclusions

As indicated, the descriptive item in connection with the switching charge in respondent's tariff IHB No. 325-U was as follows:

Railway Equipment on own wheels, viz.: Freight Cars

This is not the type of tariff charge which was contemplated by item 30(a) because it is not specific enough in regard to the kind of empty car movement covered thereby. Any other interpretation would produce the anomalous result of a vague and ambiguous exceptions provision countermanding and taking precedence over a more exact tariff rule. When the commodity shipped is included in more than one tariff designation, the Commission has

consistently found that the more specific designation applies. *Petition of Rock Island M. T. Co. for Declaratory Order,* 315 I.C.C. 482, 484 (1962). The more specific description in a tariff takes precedence. *Middlewest Motor Freight Bureau* v. *Chicago, B. & Q. R. Co.,* 309 I.C.C. 303, 305 (1959); and see *Ideal Furniture Mfg. Co.* v. *Chicago, R. I. & P. R. Co.,* 303 I.C.C. 715, 717 (1958); *Nylonge Corp.* v. *Motor Cargo, Inc.,* 305 I.C.C. 365, 366-67 (1958); *Midwest Solvents Co., Inc.,* v. *Missouri Pac. R. Co.,* 306 I.C.C. 187, 190 (1959); and *Hyman-Michaels Co.* v. *Chicago, R. I. & P.R. Co.,* 308 I.C.C. 339, 341 (1959).

In this instance, the case is even stronger in support of our analysis, since item 25 specifically included within its terms the movement in issue. If respondent's interpretation of the interplay of these tariff items is followed to its logical conclusion (based on a nonspecific switching charge described merely as affecting empty freight cars moving on their own wheels), all empty movements would have been covered under such terms and would have been at the same time removed from the provisions of the mileage allowance tariff, which would thereby be rendered a nullity. We cannot attribute such an illogical result to the interplay of these respective tariff items, to the detriment of car owners or shippers and in favor of the framers of the tariffs.

In these circumstances, we find that there was no tariff rate available within the meaning of item 30(a), which would give effect to such exceptions item; and, therefore, the rule of application in item 25 governed. Since the switching charge sought to be applied by respondent was inapplicable, it is unnecessary to determine whether it was an otherwise lawful charge.

It is ordered, That this proceeding be, and it is hereby, continued.

By the Commission, division 2.

ROBERT L. OSWALD,
Secretary

(SEAL)

APPENDIX F

CONFLICTING OPINIONS (TWO)

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Illinois Central Railroad Company, Baltimore & Ohio Railroad Company, et al., Appts.,

v.

UNITED STATES OF AMERICA, Interstate Commerce Commission, et al.

(282 U. S. 740-759.)

Argued January 15 and 16, 1931.
Decided February 25, 1931.

APPEAL from a judgment of the District Court of the United States for the Western District of Kentucky dismissing a petition to set aside certain orders of the Interstate Commerce Commission. Affirmed.

The facts are stated in the opinion.

Mr. Chief Justice Hughes delivered the opinion of the court:

This is an appeal from a decree of the district court, constituted as required by statute, dismissing the petition of the appellants to set aside, in part, two orders of the Interstate Commerce Commission, which were made on November 4, 1929, and July 30, 1929, respectively.

The first mentioned order was made in a proceeding instituted by the Commission in December, 1925, on its own motion, for an investigation concerning the use of private passenger-train cars, including so-called office cars. A questionnaire was sent to all class I. and class II. carriers, and to switching and terminal carriers, calling for information "as to private passenger-train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips." Returns were made by 387 carriers covering the calendar years 1923, 1924, and 1925. In July, 1928, a proposed report was served upon appellants and [742] all other carriers. Exceptions were filed by the Association of Railway Executives on behalf of its members, including the appellants; argument was heard and the matter submitted to the Commission. Its report was issued on June 21, 1929, setting forth the Commission's findings and conclusions. 155 Inters Com. Rep. 775. After waiver by the carriers of further hearing before the Commission, the order in question was entered requiring the carriers named, including these appellants, "to cease and desist, on or before January 15, 1930, and thereafter to abstain, from the transportation or movement of private passenger-train cars, including so-called office cars, of another carrier free or at other than published tariff rates."

The other order of the Commission under attack, that is, the order of July 30, 1929, amended the Commission's regulations, governing the form and recording of passes, by the insertion of the following: "A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common

carrier. It may not be issued for other cars. This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system. See Re Private Passenger Train Cars, 155 Inters. Com. Rep. 775."

The case was tried in the district court on the facts detailed in the report of the Commission as to the practices of the carriers, and as to these facts there was no dispute. The court concluded that the practice condemned by the Commission was a matter within its jurisdiction, and that, the order being supported by substantial evidence, the court was without power to interfere.

The evidence before the Commission consisted of the returns of the carriers to its questionnaire. These returns contained a vast amount of statistical data, differing in details but practically the same in substance, which were reviewed and tabulated in the Commission's report. The Commission found, in substance, that carriers transported [743] free of charge the private, or office, cars[1] of other carriers when occupied by persons for whose transportation it was lawful to issue a pass; that carriers also provided accessorial transportation of such cars free of charge when they were moved "deadhead" to stations where they were to be occupied, or to their home stations after occupancy, and also in switching and storing the cars. The wide extent of the practice and the abuses attending it were shown.[2] The Commission referred to the proposal of

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[1] The Commission's report and order described the cars in question as private passenger-train cars, or private passenger cars, including so-called office cars. The reference is to the private, or office, cars of carriers as distinguished from cars privately owned by persons and corporations other than railroad companies.

[2] The Commission's report states (in part): "The returns show that a substantial portion of the total mileage of private passsenger-train cars, including so-called office cars,

the [744] carriers to undertake the correction of such abuses, and stated that the Commission was concerned primarily with the legality of the free transportation of the private cars of other carriers.

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[2] (Continued)
herein referred to collectively as private cars, was on the lines of carriers other than those owning the cars. The private cars thus moved over foreign lines were transported without charge. In other words, a pass was issued covering transportation of the private cars similar to that issued for the transportation of certain classes of persons as provided for in §§ 1 and 22 of the act. . . .

"It will be understood that a private car includes a kitchen, dining room, staterooms, and observation or sitting room, together with storage space and sleeping quarters for the cook and attendants. The facilities thus provided for those traveling in private cars excel the facilities of the ordinary coach or Pullman car.

"The returns . . . show that the occupants of private cars are not restricted to officials and employees of the carriers but include in a large number of cases the families, relatives, and friends of railway officials traveling on passes or on tickets that would in most cases entitle them only to transportation in the ordinary coach." (The report cites many instances of the movement of such cars when in charge of the wives of officials and the widows of deceased officials.)

"There is also a substantial use of private cars, both on home and foreign lines, by directors of carriers. . . .

"The movement of private cars to resorts commonly patronized by those seeking recreation or amusement, and located on foreign lines, is very noticeable. . . . There is also an extensive use of private cars by short lines, industrial roads, and lines owned, controlled, or used in the interest of some particular business. The mileage of private cars used by the latter lines is largely on foreign lines, and in numerous instances the home stations of the cars and the movements thereof are so far removed from the vicinity of the owning road that it is difficult to conceive the circumstances under which such movements could have been in the interest of or connected with the operation of the road owning the car. . . .

With respect to the transportaion of privately owned cars, that is, of cars owned by others than carriers, or

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[2] (Continued)

"The returns how that a substantial portion of the total mileage of private cars, especially on foreign lines, was what is commonly referred to as 'deadhead' mileage, that is, the cars were not occupied, except in some instances by an attendant. The purpose of such movements is to return the cars to their home stations or to move them to stations where they are to be occupied. . . . The returns show numerous instances where private cars were deadheaded to and from off-line shops without charge. Also worthy of consideration is the matter of free switching service and free storage for private cars. A large number of the private cars covered by the returns are held at off-line stations when not in use. Many are so held at New York and the returns indicate that the matter of storage and switching of these cars is of considerable importance from the standpoint of operating expenditures. In numerous cases cars were rented from the Pullman Company by officers of carriers, and such cars were moved without charge by the carriers. . . .

"The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line and when used for that purpose are an important facility for carrying on the business of the road. It is seldom, however, that these duties necessitate a movement of the car over other lines. In some cases such a movement may be justified for business reasons; for example, where it avoids a very circuitous haul over the home line. But the returns to our questionnaire indicate that private cars are often used for other than business purposes by railroad officers, their relatives, and friends. Moreover, they appear to be used in some instances for the benefit of an industry which controls the railroad. In other instances, their use in entertaining shippers may be for the purpose of obtaining business for the railroad. These and other abuses are apparent from the returns, but we are here concerned primarily with the legality of the free transportation of the private cars of other carriers." 155 Inters. Com. Rep. pp. 776, 778, 779, 781, 782, 783.

of cars chartered for the exclusive use of special parties, the Commission found that such cars were transported in passenger [745] trains under tariffs which provided for certain minimum revenues,[3] and that these charges were intended to cover the service of transporting the cars, that is, "to [746] compensate for the movement of

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[3] The Commission stated: "Special, privately owned, or chartered cars for the exclusive use of special parties are transported in passenger trains under tariffs which provide for certain minimum revenues. In the case of sleeping and parlor cars, charges for a one-way movement are based on the authorized fare for each passenger, with a minimum of twenty-five adult fares, but not less than $42 for the car and party. The charges for a round-trip movement are similar, except the twenty-five fares are doubled or must be for the round trip, and the minimum revenue is $84. In either case, the surcharge must be paid for each passenger, with a minimum of twenty-five surcharges, but this is not used in computing the minimum revenue per car. When a car is moved empty or in charge of porter or other attendants, charges are assessed on the basis of ten regular adult one-way fares, plus the authorized fare for each porter or attendant, except not more than three employees of common carriers may be carried free. In this case also the minimum revenue is $42, including fares of attendants, but the surcharge is not collected. In some of the tariffs the charges for empty movements apply to carrier-owned as well as privately owned equipment. The tariffs also provide for application of the minimum fares and revenue on carrier-owned cars equipped for certain special purposes, such as advertising, exhibition, instruction, and the like. These are the provisions generally in effect, although there may be variations on individual lines. The term 'privately owned cars' is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers. Apparently a private car owned by an individual, even though a railroad official, would be subject to the tariff charges on privately owned cars. . . ." 155 Inters. Com. Rep. pp. 787, 788.

the car rather than its contents."[1] The Commission concluded that the transportation of the private cars of other carriers free, or at less than published rates, while making charges for the movement of privately owned or chartered cars, was unjustly discriminatory.

Treating the private, or office, cars of other carriers as property, to which the provisions of the Interstate Commerce Act applied, and considering that the free transportation of property was lawful only in the exceptions provided in § 22 of the Interstate Commerce Act, U. S. C. title 49, § 22, the Commission concluded that the transportation of such cars free, or at other than published tariff rates, was a violation of the act. The Commission pointed out that its finding "does not extend to the point of saying that it is unlawful for private cars of one carrier to be transported over the lines of other carriers, but is confined to the assertion that under existing law the transportation of private cars on foreign lines should be paid for through the assessment of a just and reasonable charge." 155 Inters. Com. Rep. p. 793.

The conclusions of the Commission were thus summarized in its order of November 4, 1929:

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[1] The Commission said on this point: "As heretofore pointed out, the tariffs provide certain minimum fares and revenues for the movement of special, privately owned, or chartered cars, which are evidently intended to cover the service of transporting the car. This is apparent from the fact that the charges are the same whether the car is occupied by one passenger or twenty-five. Especially in the case of cars moving empty or in charge of porter, it is manifest that the minimum fares and revenue are intended to compensate for the movement of the car rather than its contents. Apparently, the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them." 155 Inters. Com. Rep. p. 792.

"1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier [747] subject to the Interstate Commerce Act by another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;

"2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars; and

"3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial."

Appellants state that they are not attacking the third of these propositions; that is, there is no effort in this suit to set aside that part of the Commission's order which relates to the transporting of revenue passengers in business cars at the rate charged passengers holding tickets which are good only in the coach. The appellants say that it is the purpose of the carriers to remove this discrimination in some satisfactory way.

The first two propositions are those in controversy. The appellants confine their complaint in this court to the aspect of the Commission's order which holds unlawful the movement by a carrier subject to the act "of the private or business car of another such carrier when such car is occupied by a person using, and lawfully entitled to use, free transportation." A similar position is taken with respect to the other order of the Commission (of July 30, 1929), amending the Commission's regulations as to passes.

With the premise that the Commission has no authority except that delegated to it by the Congress, the appellants contend (1) that the movement under consideration "is not a shipment of property subject to § 6 of the [748] Interstate Commerce Act, which relates to property shipments;" and (2) that "the transaction here involved does not violate the discrimination provisions" of the act.

We may first consider the question of unjust discrimination. It is not open to dispute that there is discrimination in fact. The findings of the Commission are decisive upon that point. The tariffs of the carriers provide for certain minimum fares and revenues for the movement of the private cars of individuals and of corporations other than those of other carriers. These charges, as the Commission found, cover the service of transporting the car and not simply the passengers. "Apparently," said the Commission, "the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them." The Commission found that this discrimination is unjust and, so far as this is a question of fact, it does not appear that the finding lacks adequate support. The appellants emphasize the convenience to railroad officials of the existing practice. It is said that much of a railroad officer's time is spent in traveling, not only over his own lines, but to points on the lines of other railroads, in connection with questions of management and operation, as well as of financial and other executive policies of importance to all the railroads; that he must attend meetings and conferences, and hearings before commissions; that during such journeys, which frequently cover long periods, he is handling mail and business documents, and is giving attention to the conduct of his railroad work; and that he must take

with him voluminous papers and office assistants. It is also pointed out that inspection of the properties of other carriers is necessary to good management and has high educational value. But, if it is assumed that the existing practice is a convenience to railroad officials, still it does not appear that the convenience is essentially one peculiar to [749] their case. The finding of the Commission is that, while the use of private cars of railroad officials as "offices on wheels for those whose duties require considerable travel over the line," is an important facility for carrying on the business of the road, "it is seldom, however, that these duties necessitate a movement of the car over other lines." And it is a matter of common knowledge that there are large enterprises, other than railroads, extending throughout the country, or large portions of it, and requiring executive supervision; that there are numerous meetings and conferences, held in different parts of the country, of national organizations representing undertakings which are nation-wide in scope; and that those charged with administrative responsibilities in important activities must give appropriate attention to them while on their travels in the discharge of their duties or in the promotion of the interests confided to their care. Discrimination by a carrier with respect to the movement of private cars over its line, in favor of the officials of other railroad companies, and against all others who may desire the transportation of such private cars for their convenience, would require evidence to justify it (unless it can be deemed to lie outside the purview of the statute) and that evidence is lacking. We perceive no ground for disturbing the finding of the Commission as to unjust discrimination, unless it can be said as matter of law that there was none; that is, that the difference in

treatment was one which was sanctioned by the Interstate Commerce Act. It is the contention of the appellants that the practice has this sanction.

The legislative history of the Interstate Commerce Act shows clearly that the evil discrimination was the principal thing aimed at. Senate Report No. 46, 49th Cong. 1st sess. p. 215. See Kansas City S. R. Co. v. C. H. Albers Commission Co., 223 U.S. 573, 597, 56 L. ed. 556, 568, 32 S. Ct. 316. This court has said that the language of the act "is certainly sweeping enough [750] to embrace all the discriminations of the sort described which it was within the power of Congress to condemn."[1]

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[1] "Sec. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." U. S. C. title 49, § 2.

"Sec. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." U. S. C. title 49, § 3.

Shreveport Case (Houston, E. & W. T. R. Co. v. United States) 234 U. S. 342, 356, 58 L. ed. 1341, 1350, 34 S. Ct. 833. Section 3 provides that "it shall be unlawful for any common carrier . . . to make or give undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever." The prohibition, of course, does not reach the exceptional cases for which provision is made by §§ 1 and 22 of the act with respect to passes.[4] These provisions relate to the trans-

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[4] "Sec. 1. . . . (7) No common carrier subject to the provisions of this chapter shall directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospital, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or States Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, postoffice inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other

portation, [751] free or at reduced rates, of the persons and property there described. Neither section provides for the free transportation of private cars. If discrimination, which would [752] otherwise be unjust and condemned by the act, can be deemed to be saved by the exceptions stated, it must be either because the transportation of a private car is to be regarded as incidental to the free transportation of a passenger who may hold a pass, or because the transportation of a private car occupied by a passenger with a pass is not a service rendered under circumstances and conditions substantially similar to those of the transportation of a private car with passengers paying fares.

Neither of these propositions is tenable. The pass which the statute allows is in lieu of the passenger's fare and is for the transportation of the passenger. The terms

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[6] (Continued)
calamitous visitation: And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers subject to the provisions of this chapter: Provided further, That the term 'employees' as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. . . ." U. S. C. title 49, § 1 (7).

of the statutory permission go no further. Passes may be given under the statute to a variety of persons, including not only the principal officers of railroad companies but the agents and employees of common carriers, and their families, including among others, for example, furloughed and superannuated employees, and those who have become disabled or infirm in the service of a carrier, and also "the families of persons killed, and the widows during [753] widowhood and minor children during minority of persons who died, while in the service of any such common carrier." It would hardly be thought a reasonable contention that the transportation of a private car should be deemed incidental to the free transportation of all the persons in the categories mentioned. But

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* (Continued)

"Sec. 22. (1) That nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this chapter shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; . . ." U. S. C. title 49, § 22 (1).

so far as the pass per per se is concerned, the hauling of a private car occupied by such a person is as much, and as little, incidental to the pass in one case as in any other. Even in the case of a railroad official, it appears that if he owns the private car, its transportation would be subject to the tariff charges on privately owned cars. 155 Inters. Com. Rep. p. 788. The distinction, then, must be found not in the fact that a pass may be issued for the transportation of the passenger, or that the passenger is a railroad official, but in the fact that the private car in which the holder of the pass is traveling belongs to another carrier. We find nothing in the terms of the statute recognizing such a differentiation. See New York, N.H. & H.R. Co. v. Interstate Commerce Commission, 200 U.S. 361, 50 L. ed. 515, 26 S. Ct. 272; Interstate Commerce Commission v. Baltimore & O.R. Co. 225 U.S. 326, 341, 342, 56 L. ed. 1107, 1111, 1112, 32 S. Ct. 742.

Nor can it be said that so far as the transportation of the private car itself is concerned, the service is not rendered under substantially similar circumstances and conditions whether the occupants have passes or pay for their transportation as passengers. The circumstances and conditions relating to the transportation of the cars, *as such*, are alike. The cars are hauled between the same points, on the same line, in the same or like passenger trains, and in the same manner.

The appellants' contention rests largely upon the long continuance of the practice of the carriers to transport the private, or office, cars of other carriers free of charge, and upon the fact that the Interstate Commerce Commission has not only not interfered with the practice heretofore, [75ℓ] but has apparently sanctioned it by its regulations in recognizing passes for such cars. The argument

based on this asserted sanction is addressed both to the conclusion of the Commission that the movement of such cars free, or at other than published tariff rates, is contrary to the provisions of the Interstate Commerce Act, and to the conclusion of the Commission as to unjust discrimination. It is said that in view of the nature of the subject of the transportation, and especially in the light of past administrative construction, the act should be construed as not forbidding the free transportation of the cars in question, and that, if it is lawful to move the carrier-owned car free, no unlawful discriminatory conditions arise from the difference of treatment of privately owned cars. In this view, the right of free transportation of the cars in question is made the fundamental consideration and we pass to the examination of that question.

Supporting their contention in this respect, the appellants argue that the movement of the private, or office, car of another carrier is not a shipment of property; that such a car in the movement under consideration is to be regarded as a facility of the carrying line, ranking as its own for the purposes of the service. The Commission dealt with the question when railway equipment generally may be transported without charge. The Commission said that, of course, a carrier may transport its own property without the payment of tariff charges; that, likewise, property which is hired or rented for the performance of its common-carrier duties may be transported in the same way as property which it owns. The Commission reviewed the terms on which freight cars and passenger cars move over foreign lines. It found that "so long as a car is being handled for revenue purposes, it is in service and not subject to charges; but when it is transported [755] solely for the benefit of the

owning line, the latter must pay for such transportation on another line." The Commission further found that "the criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car; that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line." 155 Inters. Com. Rep. pp. 786, 787. After referring to the tariff charges for the movement of "special, privately owned, or chartered cars for the exclusive use of special parties" when transported in passenger trains,[1] the Commission reached the following conclusion: "It will be seen from the foregoing that tariff charges are provided for the transportation in freight trains of both carrier and privately owned cars of all kinds, when they are handled solely for the benefit of the owner and not for revenue purposes. It would not be seriously urged that such transportation could be rendered free if an attendant or other person having a pass should ride in the car. The tariffs also provide minimum charges for the transportation in passenger trains of special, privately owned, or chartered cars for the exclusive use of special parties. Apparently, these minimum charges would not be lessened or affected in any way if a person or persons having passes should ride in the car. All of these charges show that there is nothing in the nature of railway equipment which justifies its transportation without charge, except when it is being handled for revenue purposes in the interest of the carrier performing the service. Even then the revenue from a passenger car used exclusively by a special party must be sufficient to warrant its transportation. . . . The transportation of a private car of another

[1] See note 3.

carrier is ordinarily for the benefit of the owning line or its officials and not for ordinary purposes. While [756] ticket passengers may sometimes occupy such a car, they do so by invitation, and the carrier performing the transportation is not at liberty to make use of the car by putting other passengers in it. The returns to our questionnaire indicate that it is seldom, if ever, that the number of ticket passengers is sufficient to make the hauling of the private car of another carrier profitable to the carrier performing the service. This is further indicated by the additional fact that such passengers apparently do not pay the surcharge, which is assessed on persons riding in Pullman and privately owned or chartered cars. Indeed, the few ticket passengers sometimes riding in the private car of another carrier could probably be accommodated in other equipment that must be hauled anyhow, and the transporting carrier would receive more revenue if they rode in an ordinary Pullman car. Under these circumstances a carrier hauling the private car of another line can not be said to have hired its use, as it would have no interest in doing so and pays no rental therefor. Even if car hire should be provided on private cars, it would obviously be a mere subterfuge which could not change the legality of the practice. Our conclusion is that the transportation of the private car of another carrier is not of such advantage to the carrier performing the service as to warrant its performance without charge, on the same principle as the free handling of revenue-producing equipment." Id. pp. 788, 789. On the findings of the Commission, we perceive no ground for the conclusion that the cars in question are to be treated merely as a facility of the carrying line and not as property transported.

The Commission referred to the argument that the carriers had always hauled the private cars of other lines without charge, and that this practice had been well known to the Commission and had been expressly approved by it. Endeavoring to meet the contention that the Commission in its conference rulings and pass regulations [757] of 1917 had prescribed a form of pass for railway officials and employees, which included the word "car," and which, as the carriers asserted, applied to foreign-line cars, the Commission said that the form of pass should be given a construction in harmony with the law and that the Commission "never intended to approve the practice of issuing passes for the private cars of other lines." There is, however, no question as to the long-continued practice of transporting the private cars of other lines without charge, and it would seem that the form of pass prescribed by the Commission was available and was used in this practice. The Commission stated that this was the first time that the lawfulness of the practice of issuing passes for foreign-line private cars had been brought in issue before it, but the Commission recognized that the practice prevailed at the time of the passage of the Act to Regulate Commerce and had been continued. It appears that prior to this proceeding, the Commission had not attempted to disturb it.

The act has been repeatedly amended, and has been re-enacted, without any change directed to the correction of this practice. It is strongly urged that in the light of these circumstances the adminstrative construction should be determinative. The principle is a familiar one that in the interpretation of a doubtful or ambiguous statute the long-continued and uniform practice of the authorities charged with its administration is entitled to great weight,

and will not be disturbed except for cogent reasons. Logan v. Davis, 233 U.S. 613, 627, 58 L. ed. 1121, 1128, 34 S. Ct. 685; Kern River Co. v. United States, 257 U.S. 147, 154, 66 L. ed. 175, 179, 42 S. Ct. 60; Swendig v. Washington Water Power Co., 265 U.S. 322, 331, 68 L. ed. 1036, 1040, 44 S. Ct. 496; United States v. Minnesota, 270 U.S. 181, 205, 70 L. ed. 539, 548, 46 S. Ct. 298; Wisconsin v. Illinois, 278 U.S. 367, 413, 73 L. ed. 426, 432, 49 S. Ct. 163. But that principle does not go far enough to control the decision here. There is no ambiguity in the requirement of §6(1) of the act that its provisions as to published tariffs "shall apply to all traffic, transportation, [758] and facilities defined in this act." Whether the private, or office, cars of other carriers are to be deemed property transported, or a facility of the carrying line, depends upon the circumstances of the carriage as matters of fact, and when the facts have been resolved by the Commission upon evidence, there is no escape from the application of the broad provision of the statute. Similarly, there is no ambiguity, so far as the terms of the provision of §3(1) are concerned, in its prohibition of discriminations, when it has been found as a fact that these cars are transported for the benefit of the owning line and do not belong in the category of the facilities of the carrying line, and that transporting them free of charge constitutes an unjust discrimination, as compared with the tariff charges for the transportation of privately owned cars. Nor are the provisions of §§1(7) and 22(1) to be deemed ambiguous by reason of the omission of private, or office, cars owned by carriers from the specification of persons or property that may be carried free. The omission simply takes the cars out of the provisions of the sections. Whatever doubt or uncertainty attached to the application of the provisions

of the act to the transactions under review lay in the appreciation of the facts, and appropriate action thereon, and not in the interpretation of the terms of the law after the facts have been ascertained. Thus, in American Exp. Co. v. United States, 212 U.S. 522, 53 L. ed. 635, 29 S. Ct. 315, it was argued by the appellants that the custom of express companies to issue such passes as were there in question was one of long standing and presumably known to Congress; that there was no record of any protest against it to or by the Interstate Commerce Commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited; that there was no direct or express prohibition [759] in the statute, but, on the contrary, the Interstate Commerce Act recognized and always had recognized that the granting of similar privileges to the officers and employees of railroad companies was consistent with sound public policy (p. 523). And this court stated in its opinion that the facts were not seriously in dispute, and showed that it had been the custom of express companies for many years to issue franks such as were embraced in the proceeding (p. 529). But this court held that, in view of the all-embracing prohibition of the act, it could not be doubted that the transportation of property, such as was shown in that case, upon franks issued by the express companies, was within the terms of the act. If the practice could be deemed to be lawful, the court said that the right must be founded upon some exception incorporated in the statute. The court found no such exception and gave effect to the act according to its terms.

Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter

provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice.

We are of the opinion that the order of the Commission of November 4, 1929, was within its authority. For similar reasons, we conclude that the Commission had power to revise its regulation as to passes in the manner provided by the order of July 30, 1929.

Decree affirmed.

Mr. Justice McReynolds and Mr. Justice Sutherland are of opinion that the decree of the court below should be reversed.

NATIONAL VAN LINES, INC., et al.,
Plaintiffs-Appellants,

v.

UNITED STATES of America and Interstate Commerce Commission,
Defendants-Appellees.

No. 15071.

United States Court of Appeals
Seventh Circuit.

Jan. 14, 1966.

355 F.2d 326

Motor carriers, suing as members of a class, sought reversal of a decision of the United States District Court for the Northern District of Illinois, Eastern Division, Michael L. Igoe, J., upholding an order of Interstate Commerce Commission which concluded that carriers had collected charges from shippers in excess of published tariffs. The Court of Appeals, Swygert, Circuit Judge, held that tariff which was ambiguous due to absence of a note inadvertently omitted therefrom should be construed in accord with the construction urged by carriers who had allegedly collected overcharges in excess of published tariffs, where such construction presented a reasonable alternative, accorded with the intention of its drafters, and would avoid possible violations of the law, and no reason existed for court to defer to Interstate Commerce Commission's construction of a tariff where Commission's determination was not reached upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportantion was indispensable.

Reversed.

Before Hastings, Chief Judge, and Knoch and Swygert, Circuit Judges.

Swygert, Circuit Judge.

The Household Goods Carriers' Bureau and ten motor carriers of household goods, suing as members of a class, seek reversal of a district court decision upholding an order of the Interstate Commerce Commission. The order of the Commission concluded that the carriers had collected charges from shippers in excess of published tariffs in violation of section 217(b) of the Interstate Commerce Act, 49 U.S.C. § 317(b)[1] The question presented concerns the Commission's interpretation of the tariffs published by the carriers.[2]

The tariffs in issue were filed in 1959 by the Household Goods Carriers' Bureau, as agent for its 1700 carrier-members, pursuant to agreements approved by the Commission. The 1959 tariffs replaced tariffs which had been in effect since early 1957. The difference between the 1957 and 1959 tariffs provides the background for this appeal.

The general features of the 1957 and 1959 tariffs are similar. Both begin with extensive recitation of general rules and regulations, followed by a table giving rates for shipments of various distances and weights.

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[1] The Commission's decision is reported at 315 I.C.C. 537 (1962).

[2] The case is here for the second time. In an earlier appeal, National Van Lines, Inc. v. United States, 326 F.2d 362 (7th Cir. 1964), we held that the orders of the Commission declaring that departures from published tariffs had occurred were reviewable by the district court, but we expressed no opinion on the merits of the Commission's tariff interpretations.

Section II of the 1957 tariffs,[3] which follows the general provisions, is a rate-fixing section. Its scope of application is specifically stated to be "shipments * * * transported between all points in the United States, Canada and Mexico." The following exception then appears: "These rates will not apply in territory described in Section III except as otherwise provided in Section III. * * *" The rate table itself is then set out, providing rates for shipments of different weights for distances from 1 to 4300 miles. At the end of the rate table is a note which reads: "Over 4300 miles, see Rule 23."

Section III of the 1957 tariffs is another rate-fixing section. It specifically relates to shipments from the northeastern part of the country and certain parts of the Chicago metropolitan area to "any point in the United States, Canada and Mexico." The rate table which follows lists rates for shipments of different weights for distances from 1 to 500 miles.[4] A note at the end of the table states: "Over 500 miles, apply rates shown in Section II."

Rule 23, mentioned in the note after the tables in Section II, is contained in the general provisions of both the 1957 and 1959 tariffs. It provides that when a shipment is transported a distance in excess of that shown in the rate tables, a charge of 75 cents (25 cents in the 1959 tariffs) will be added "for each additional 100 miles * * * in excess of the distance shown in the rate table to obtain

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[3] Tariff MF—I.C.C. No. 75 will be used here as an illustration of the language of the 1957 tariffs. Relevant portions of this tariff are set out in Appendix A.

[4] The purpose of a special section of this type was to provide higher rates for the carriers in the areas in which they experienced higher labor costs.

per hundred pound rate applicable on the shipment."[5]

The 1957 tariffs were replaced by tariffs filed during 1959.[6] The provisions of the new tariffs were nearly identical with those of the 1957 tariffs,[7] except for changes necessary to reflect rate increases[8] and with one relevant omission. The 1959 tariffs inadvertently omitted the note "over 500 miles, apply rates shown in Section II" at the end of the table in Section III.

In spite of the omission of the note at the end of Section III, the carriers continued to apply the rates stated in the 1 to 4300 mile table of Section II to shipments exceeding the 500 mile limit of the table in Section III. In other words, on shipments originating in the northeastern states and the Chicago metropolitan area the carriers computed charges from the rate table in Section III for shipments between 1 and 500 miles, and utilized Section II for shipments over 500 and under 4300 miles.

Early in 1960, the omission of the note at the end of the table in Section III of the 1959 tariffs was noticed by a shipper, who thereupon filed claims for overcharges. The shipper contended that, with the omission of the

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[5] Rule 23 was designed to provide a tariff for those unusual circumstances when, because of a shipment-diversion, a given shipment might move more than 4300 miles, the maximum distance shown in the rate tables.

[6] Tariff MF—I.C.C. No. 89, which cancelled MF—I.C.C. No. 75, will be used here as an illustration of the language of the 1959 tariffs. Relevant portions of this tariff are set out in Appendix B.

[7] A clause excepting points in Alaska and Hawaii from the application of the rate tables in Sections II and III was one of the few minor changes made in the 1959 tariffs.

[8] A few rate reductions were made. In the most significant reduction, the additional rate for shipments moving a distance in excess of those shown in the rate tables (Rule 23) was reduced from 75 cents to 25 cents.

note, shipments originating in Section III territory which were transported a distance in excess of 500 miles were governed by Section III in conjunction with Rule 23 rather than by Section II, thus producing substantially lower charges than those computed under Section II.

The note following the table in Section III was eventually reinserted by tariff supplements issued from time to time during 1960.

The Commission began an investigation late in 1960 to determine whether the carriers had charged rates greater than, or different from, those prescribed in the 1959 tariffs. A majority of six Commissioners found that the charges made by the carriers during the period when the note at the end of Section III was omitted were not in conformity with a proper interpretation of the tariffs. Five Commissioners dissented, four of them on the ground that the omission of the note had no effect on the application of the tariffs.

The construction given by the majority was incorporated in the Commission's order.[9] A motion to vacate the order was denied. The district court affirmed the order of the Commission. This appeal followed.

The Commission based its decision upon the proposition that a literal interpretation of the 1959 tariffs results in but one possible construction. The following portions of the tariffs are pertinent to the Commission's reasoning: (1) Section II, which provides a rate table for distances from 1 to 4300 miles and is applicable to shipments from and to "all points in the United States * * *, Canada and Mexico," states that its rates do not apply in "territory described" in Section III "except as otherwise provided in

[9] The order required no affirmative action, since the Commission is without power to order motor carriers to make reparations.

Section III"; (2) Section III provides a 1 to 500 mile rate table which applies to all shipments originating from the points described therein and destined for "any point in the United States * * *, Canada and Mexico"; (3) Rule 23, applicable "when a shipment is transported a distance in excess of that shown in the rate tables," provides, "first find the rate in the applicable weight column for the greatest distance shown in the applicable table of rates. Add to [this] rate * * *"

From these provisions, the Commission reasoned that Section II is not applicable to any shipments, regardless of distance from any point listed on the title page of Section III, and that therefore the rate for a shipment in excess of 500 miles originating from any point listed in Section III must be determined by adding an amount based upon the formula in Rule 23 to the rate provided by Section III for the maximum 500-mile distance. The Commission concluded, in effect, that without the note contained in the 1957 tariffs, Section III does not allow a shipment from Section III territory in excess of 500 miles to be charged at Section II rates. The Commission summarized its position as follows.

> This title page [Section III] contains no exception which would allow section II rates to apply on such shipments. We see no escape from the conclusion that the reference to "territory described in Section III * * *" is to the particular territorial description on the title page of section III and not merely to transportation within that territory for distances not exceeding 500 miles.

Four of the dissenting members of the Commission adopted an entirely different view. They found an ambiguity or uncertainty in the 1959 tariffs. The dissenters stated:

> The uncertainty results from doubtful and ambiguous tariffs which * * *, are subject to two possible and feasible interpretations; one, rather technical, which results in overcharges aggregating several million dollars and in some situations undercharges amounting to as much as $800 on one single shipment. This is the interpretation adopted by the majority.
>
> The other feasible interpretation—the fair and reasonable one in the circumstances here presented * *, would give effect to the clear and *undisputed* intention of the framers of the tariffs, and require no readjustment of the rates charged. * * *

We agree with the conclusion of the dissenting members of the Commission that absent the note inadvertently omitted from Section III in the 1959 tariffs there is an uncertainty about what rates are applicable to shipment over 500 miles which originate in the restricted territory described in that section. Section III's title page, as we pointed out, provides that the rates listed therein apply to shipments from the northeastern section of the country and metropolitan Chicago to *any point* in the United States, Canada, and Mexico. Yet the rate table in Section III provides rates for shipments of a maximum distance of only 500 miles. The ambiguity is apparent. Many points in the United States, Canada, and Mexico are over 500 miles from any point of origin listed in Section III. The uncertainty, furthermore, is not resolved by a reading of Rule 23. That rule provides that it will apply "when a shipment is transported a distance in excess of that shown in the rate *tables*." Although Section III is limited by the provision for shipments of less than 500 miles only, Section II provides a table for shipments up to 4300 miles and is expressly applicable to shipments from and to any point in the United States, Canada, and Mexico. Section II, in turn,

excepts from its application the "territory described" in Section III. It is not clear whether the "territory described" in Section III consists solely of the geographical areas listed or is limited by the scope of the rate table immediately following.[10]

Since there can be but one rate applicable on any given shipment, the problem is to determine that rate from a proper construction of the tariffs. In undertaking this construction, the ambiguity to which we have referred must be resolved.

The resolution of the ambiguity brings us to a consideration of the construction of the tariffs urged by the carriers and with which the dissenting members of the Commission agreed. As they suggest, Section II basically applies to all shipments from and to all points in the United States up to 4300 miles. Section III is a limited exception to this general provision. The carriers contend that the title page of Section III, listing certain "restricted" areas of origin and designating the United States, Canada, and Mexico as destination points, should be read together with the rate table immediately following. When thus read, the rate table limits the "territory described" in Section III to any point within 500 miles of the restricted points of origin listed in Section III. Accordingly, shipments in excess of 500 miles originating from these points are not within the coverage of Section III at all. These shipments, however, are within the express coverage of Section II.

The carriers, moreover, point out that the note, "over 500 miles, apply rates shown in Section II," appearing in the 1957 tariffs was placed at the end of the rate table

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[10] All parties seem to agree that the words "territory described in Section III" contained in the exception stated in Section II may not be taken literally in at least one sense. Since by its own language Section III is limited to shipments *originating from* the points listed, the "territory described" is similarly restricted.

of Section III, apart from the table itself. This placement, they say, is an indication that the note was merely a helpful cross-reference or guide to shippers and was not essential to a proper application of the tariffs.

[1,2] It is conceded that the reference note was omitted through inadvertence. It is contended for the Commission that, inadvertent or not, the omission of the note changed the meaning of the tariffs, and that the law is *clear that deviation from a published tariff may not be excused. The latter statement is accurate, but inapplicable here.* If there were no doubt about the construction of the 1959 tariffs, as published, the Commission majority would be correct. Section 217(b) of the Interstate Commerce Act, 49 U.S.C. §317(b), imposes upon a carrier the absolute obligation to collect charges in accordance with published tariffs. Inadvertent mistake provides no excuse for a deviation. Armour & Co. v. Atchison, T. & S. F. Ry., 254 F. 2d 719 (7th Cir. 1958). Even though the tariff of a common carrier through inadvertence violates the long and short haul clauses in section 4 of the act, 49 U.S.C. §4, deviation will not be permitted. Davis v. Portland Seed Co., 264 U.S. 403, 44 S. Ct. 380, 68 L. Ed. 762 (1924); Beaumont, S. L. & W. Ry. v. Magnolia Provision Co., 26 F. 2d 72 (5th Cir. 1928). In short, *application of tariffs as published is required regardless* of the intention of the parties and irrespective of the equities existing between carriers and shippers. Louisville & N. R. R. v. Maxwell, 237 U.S. 94, 35 S. Ct. 494, 59 L. Ed. 853 (1915).

We have already concluded, however, that the inadvertent omission of the note in Section III of the 1959 tariffs does not ipso facto change the meaning of the tariffs. At most, it creates an ambiguity or uncertainty. We agree with the carriers and the dissenting members of the Commission that their construction of the tariffs is a feasible interpretation which serves as an alternative to the

construction given by the Commission majority. Under such circumstances, we think the traditional rules of construction of written instruments are controlling in arriving at the proper application of the tariffs. The intention of the framers and other considerations thus become relevant.

The construction given the tariffs by the Commission would defeat the intention of the carriers. The Commission admitted that the purpose of Section III was to provide higher rates for short hauls from a section of the country that is more densely populated and has more congested highways, higher wage rates, and higher carriers' costs than other areas. But according to the Commission's interpretation charges on shipments exceeding 500 miles from the high cost area would generally be much lower than the charges on shipments originating in other parts of the United States. For example, only $438 would be charged on a 4000 pound shipment from Cleveland to Los Angeles (2422 miles) whereas $516 would be charged on a shipment of the same weight from Kansas City to Los Angeles (1653 miles). Similarly, the charge on a shipment from Chicago to San Francisco would be less than the charge from Omaha to San Francisco and the charge from Detroit to Miami would be less than the charge from Charleston, West Virginia, to Miami.

The purpose of the 1959 tariffs was to effect a general increase in transportation rates. The title pages of Sections II and III of the 1959 tariffs note in accordance with Commission directives that "all rates in this section are increases unless otherwise indicated." Symbols indicating a reduction or no change in prior rates appear in a comparatively small number of instances. Yet under the Commission's interpretation the 1959 tariffs would have produced reductions from the 1957 tariffs on many shipments from the "restricted" territory beyond a 500

mile limit contrary to the intended and expressed purpose of the carriers.[11]

[3] Another rule of construction is that a tariff should be interpreted to avoid unjust, absurd, or improbable results. Glickfeld v. Howard Van Lines, Inc., 213 F. 2d 723, 727 (9th Cir. 1954); A. E. West Petroleum Co. v. Atchison, T. & S. F. Ry., 212 F. 2d 812, 816 (8th Cir. 1954). If a tariff is subject to different constructions, an interpretation which is reasonable and consistent with the purposes of the tariff should be preferred to a construction which is impractical or which leads to absurd consequences. The construction adopted by the Commission majority in this case has already been shown to violate the intention of the carriers. This construction also requires the determination of shipping charges by an unusual process in which the principal rate-fixing formula is obscured as an insignificant exception in a maze of general rules and regulations. Such a strained application of the tariffs should not prevail in the face of the reasonable alternative urged by the carriers.

[4-6] It is also settled that contracts and other written instruments will be construed to avoid a possible violation of law. Perry Coal Co. v. N. L. R. B., 284 F. 2d 910, 914 (7th Cir. 1960), cert. denied, 366 U.S. 949, 81 S. Ct. 1903, 6 L. Ed. 2d 1242 (1961). Thus a tariff should receive a construction which produces charges that are legal, in preference to one which would produce illegal rates. Great No. Ry. v. Delmar Co., 283 U.S. 686, 691, 51 S. Ct. 579, 75 L. Ed. 1349 (1931). Here, the application of the 1959 tariffs by the Commission results in charges which

[11] It was estimated by testimony before the Commission that if the Commission's interpretation were to stand, the over-charges by four of the carriers would aggregate approximately two and one-half million dollars.

would probably be unreasonable and discriminatory within the meaning of section 216(d) of the Interstate Commerce Act, 49 U.S.C. §316(d). Further, such charges would violate the principle of the long and short haul clause of section 4 of the act, 49 U.S.C. §4, a principle which is applicable in determining the prima facie reasonableness of all tariff rates. Patterson v. Louisville & N. R.R., 269 U.S. 1, 11, 46 S. Ct. 8, 70 L. Ed. 131 (1925). The construction of the tariffs urged by the carriers is to be preferred for this reason.

[7] The practical application of tariffs by interested persons should also be considered in determining the meaning of the tariffs. This conclusion follows from the rule that in interpreting contracts courts will give weight to what the parties themselves have done pursuant to their agreements. American Cyanamid Co. v. Ellis-Foster Co., 298 F. 2d 244, 246 (3rd Cir. 1962); Oddie v. Ross Gear & Tool Co., 305 F. 2d 143, 151 (5th Cir.), cert. denied, 371 U.S. 941, 83 S. Ct. 318, 9 L. Ed. 2d 275 (1962). Here the carriers made charges in accordance with a reasonable interpretation of the tariffs and, with one exception, all shippers—many of whom customarily audit their shipping charges—made payment without objection.

[8,9] It is contended for the Commission, that any ambiguity which appears in the tariffs must be resolved in favor of the shippers, that the carriers should not receive the benefit of a liberal rule of construction. It is true that doubt about the meaning of tariffs is generally resolved against the carriers as a corollary to the rule that written instruments will be construed strictly against their drafters. United States v. ICC, 91 U.S. App. D.C. 178, 198 F. 2d 958, 966, cert. denied, 344 U.S. 893, 73 S. Ct. 212, 97 L. Ed. 691 (1952); United States v. Missouri-Kansas-Texas R.R., 194 F. 2d 777, 778 (5th Cir. 1952).

However, we do not think that such a rule should be followed when it is outweighed by other equally settled and applicable rules of construction. A strict construction of the tariffs against the carriers who drafted them is not justified when such construction ignores a permissible, reasonable construction which conforms to the intention of the framers of the tariff, avoids possible violations of the law, and accords with the practical application given by shippers and carriers alike.

[10,11] Finally, it is contended that the Commission's construction is entitled to substantial weight, citing, among other cases, Sonken-Galamba Corp. v. Thompson, 225 F. 2d 608 (10th Cir.), cert. denied, 350 U.S. 896, 76 S. Ct. 154, 100 L. Ed. 788 (1955). But as that case noted, *decisions of the Commission are not conclusive.* Although due weight should be accorded the Commission's construction of a tariff, it is within the competence of a courts to construe a tariff in a manner which differs with the Commission's interpretation, *particularly when the construction presents a question solely of law.* Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922). *The application of rules of construction to undisputed facts, the situation here, is classically a question of law. There is no reason to defer to the Commission's construction in such circumstance.* The Commission's determination was not reached "upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable * * *." Great No. Ry. v. Merchants Elevator Co., supra at 291, 42 S. Ct. at 479.

For the foregoing reasons we hold that the tariffs under scrutiny were erroneously interpreted by the Commission and that the district court erred in upholding the Commission's decision. The judgment of the district court is reversed.

APPENDIX G

TITLE 49, SEC. 2

Special Rates And Rebates Prohibited

Sec. 2. [*As amended February 28, 1920, June 19, 1934, and August 9, 1935.*] [*49 U.S.C.*, §2.] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

APPENDIX H

TITLE 49, SEC. 15(13)

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

APPENDIX I

Title 49, Sections 1(7) and 22(1)

Section 1(7)

(7) No common carrier subject to the provisions of this part shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employers, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals; and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Depart-

ment and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further,* That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this part: *Provided further,* That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of those persons killed, and the widows during widowhood and minor children during minority of persons who died, yhile in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United

States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof.

NOTE.—Compare §22, infra. Provisions of this paragraph applicable to common carriers under part II, §217(b); part III, §306(c).

Special provisions: As to trustees of Cincinnati Southern Railway, their officers and agents, §53, infra; members of National Guard organizations, Act of Aug. 29, 1916, 39 Stat. 646 (32 U.S.C. §73); agents and officers of Post Office Department, Act of July 28, 1916, 39 U.S.C. §523, infra. Annuitants and pensioners under Railroad Retirement Acts of 1935 and 1937 may lawfully be furnished free transportation by railroads, the same as their employees, 45 U.S.C. §228r, infra.

(8) From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be Section 22(1).

RESTRICTIONS

Sec. 22. [*As amended March 2, 1889, February 8, 1895, August 18, 1922, February 26, 1927, March 4, 1927, June 27, 1934, August 9, 1935, July 5, 1937, August 25, 1937, September 18, 1940, September 27, 1944, July 27, 1956, August 31, 1957.*] [*49 U.S.C.* §22], (1) That nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this part shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes or Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this part shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at

their own expense to their homes or other prospective places of abode; nothing in this part shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the free carriage, storage or handling by a carrier of the household goods and other personal effects of its own officers or employees when such goods and effects must necessarily be moved from one place to another as a result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies; nothing in this part shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose, or from carrying a disabled person accompanied by an attendant if such person is disabled to the extent of requiring such attendant, at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier: *Provided,* That no pending litigation shall in any way be affected by this part: *Provided further,* That nothing in this part shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this part, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate

Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this part; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this part shall apply to any violation of the requirements of this proviso. Nothing in this part shall prevent any carrier or carriers subject to this part from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall (1) define such section, (2) specify the period during which such reduced rates are to remain in effect, and (3) clearly define the class or classes of persons entitled

to such reduced rates: *Provided,* That any such order may define the class or classes entitled to such reduced rates as being persons designated as being in distress and in need of relief by agents of the United States or any State authorized to assist in relieving the distress caused by any such calamitous visitation or disaster. No carrier subject to the provisions of this part shall be deemed to have violated the provisions of such part with respect to undue or unreasonable preference or unjust discrimination by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order of the Commission authorizing such reduced rates.

NOTE—Provisions of this section apply to common carriers, part II, §217(b); part III, §306(c); provisions as to property apply to freight forwarders, part IV, §405(c).

SUPREME COURT, U. S.
FILED
MAY 19

IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-1326

INDIANA HARBOR BELT RAILROAD COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
GENERAL AMERICAN TRANSPORTATION CORPORATION and
NORTH AMERICAN CAR CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The decision of the Court of Appeals of which petitioner seeks review involved the careful application of principles which have been approved by this Court on numerous occasions. The Court of Appeals reversed a decision by the District Court which had (1) set aside a report and order of the Interstate Commerce Commission despite a finding that the Commission's decision had a rational basis and was supported by substantial evidence, and (2) made *ab initio* an independent finding regarding the lawfulness of a railroad tariff, although the Commission had not considered or decided that question. In making this latter finding, the District Court decided matters which have uniformly been held to be within the exclusive primary jurisdiction of the Interstate Commerce Commission. Since the decision of the Court of Appeals is clearly correct and

is based on well-established principles of law, the petition for a writ of certiorari should be denied.

The controversy before the Court of Appeals was initiated when the Indiana Harbor Belt Railroad (IHB) filed two suits in the United States District Court for the Northern District of Illinois seeking to collect freight charges on the movement of privately-owned tank cars to and from repair facilities located on the IHB. The IHB based its claims on a new interpretation of a *general* provision in one of its published tariffs (IHB 325-U). IHB claimed that it had previously "unaccountably" failed to bill and collect charges for the movements in question under the provisions of this tariff. The charges sought in the suit covered the three-year period prior to the filing date.

Defendants General American Transportation Corporation and North American Car Corporation denied liability for these charges on the grounds that another tariff to which IHB and all other major railroads were parties (Maurer's Mileage Tariff 7 series) *specifically* required that movements of private cars to and from repair facilities be made without charge. This tariff provision was designed to insure equality of treatment for shippers who provide their own cars and other shippers who use cars furnished by the railroads. Shippers who use railroad-owned cars and those shippers who furnish their own cars pay the same basic freight rates for the movement of their commodities. Since the former do not pay an additional charge for movements to and from repair facilities, the mileage tariff provides for similar movement without charge for privately-owned cars.

Defendants maintained that the charges allegedly due were not only improper as a matter of tariff interpretation, but were unreasonable and unlawful under the Interstate Commerce Act. Defendants also filed counterclaims seeking to recover charges which had mistakenly been paid for similar movements of privately-owned freight cars other than tank cars.

Concurrently with the filing of their answers and counterclaims, defendants moved to stay the court actions and to refer certain issues to the Interstate Commerce Commission. The District Courts granted these motions and framed the following two questions which were to be referred to the Commission:

> "(a) Whether the movements of privately owned cars therein described are subject to the charges which Plaintiff has collected and seeks to collect or whether such movements are subject to rules and regulations which provide that they shall be made without charge;
>
> "(b) If such movements are subject to the charges which Plaintiff has collected and seeks to collect, whether the imposition of such charges on the movements in question is reasonable and lawful under the provisions of the Interstate Commerce Act."

In its final report and order, the Commission concluded that the tariffs required the IHB to make the movements in question without charge. In accordance with the reference order, the Commission did not reach the second question—whether the assessment of charges would be lawful—and expressly refrained from deciding it.*

The IHB then filed a third action in the District Court seeking to set aside the Commission's decision. The District Court first determined that the Commission's interpretation of the tariffs in question was a reasonable one and was supported by substantial evidence. The court proceeded,

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* Neither the Commission nor its hearing examiner considered the question of whether the movement of private cars to and from repair shops without charge would somehow be unlawful. Pursuant to the express and specific terms of the mileage tariff, railroads, including the IHB for the previous fifty years, do not assess charges on these movements. The complaint filed by IHB did not claim or allege that this tariff (to which IHB was an unqualified party) was unlawful, and the order of reference did not, therefore, suggest any such question for consideration by the Commission.

however, to review the Commission's order and "the Items in suit in the larger perspective of their interrelationship to the entire scheme of railroad charges and tariffs" and concluded that the tariffs in question, as interpreted by the Commission, precipitated a violation of the provisions of Section 2 of the Interstate Commerce Act. On the basis of this conclusion, the court refused to enforce the tariff provisions and held that the IHB could collect freight charges on the movements in question.

The United States, the Interstate Commerce Commission and the defendant car companies appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. In a unanimous decision by a three-judge panel, the Court of Appeals reversed. The court held that "the district court in reaching its decision took into consideration matters not properly before it and that on the issue which was properly before it, the validity of the interpretation by the Commission of the tariff involved, the court erred". With respect to the tariff interpretation question, the Court of Appeals noted "the [district] court conceded that if one were limited to the face of the record alone good judgment could favor either view of the impact of the tariffs upon each other," and then said "with this conclusion we agree and we think that the court should have so limited its consideration of the Commission's order". As to the District Court's finding that the tariffs as interpreted by the Commission resulted in unlawful discrimination, the Court of Appeals said "we are satisfied, in particular, that it was not within the province of the district court, in reviewing the determination of the Commission . . . to consider *ab initio* [this] question . . . for it is settled that primary jurisdiction for determining whether rate charges are discriminatory lies with the Interstate Commerce Commission and not with the courts. *United States* v. *Wabash R.R.*, 321 U.S. 403, 410-411 (1944)."

At the conclusion of its opinion, the Court of Appeals addressed the IHB's claim, not ruled upon by the District

Court, that the Commission's order violated the Fifth Amendment. The Court stated that the IHB "did not make the showing as to its overall operations which was necessary to enable the court to consider such a claim. *Baltimore & Ohio R.R.* v. *United States,* 345 U.S. 146, 150 (1953)."

ARGUMENT

I

THIS COURT HAS UNIFORMLY HELD THAT THE INTERSTATE COMMERCE COMMISSION HAS PRIMARY JURISDICTION TO DETERMINE THE LAWFULNESS OF RAILROAD TARIFFS UNDER SECTION 2 OF THE INTERSTATE COMMERCE ACT.

The principal issue raised by this case is whether the Court of Appeals erred in holding that "it was not within the province of the District Court . . . to consider *ab initio* the question of whether the application of the tariffs, as interpreted by the Commission, would result in unlawful discrimination . . . ." A long and unbroken line of decisions by this Court directly addressing this point establishes beyond question that the Court of Appeals was correct. There is no conflict of authority on this question either in the decisions of this Court or among the Circuit Courts. Accordingly, IHB's petition for writ of certiorari should be denied.

The landmark case in this area is *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907), involving a suit by a shipper to recover a portion of the freight charges collected by the railroad for shipments of cottonseed. The shipper alleged that the tariff charges were unreasonable and unjust and, therefore, unlawful under the Interstate Commerce Act. The trial court conducted a hearing, concluded that the challenged freight charges were unjust and unreasonable, and entered judgment for the shipper in the amount by which the court determined that the freight rate exceeded a just and reasonable charge. This Court re-

versed, holding that a prior determination by the Interstate Commerce Commission on the lawfulness of the challenged tariffs was a prerequisite to the right to judicial relief. This Court explained its decision in part as follows:

> ". . . if it be that the standard of rates fixed in the mode provided by the statute could be treated . . . by a court and jury as unreasonable, without . . . prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, . . . a shipper might obtain relief [from] a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced.
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> "Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. . . . Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, with power, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, if the power was left in courts to grant relief upon the theory that the established rate could be disregarded and be treated as unreasonable. . . ." (204 U.S. at 439-441)

This Court has many times reaffirmed the principle, initially formulated in the *Abilene* case, that the Interstate Commerce Commission has primary jurisdiction to determine the lawfulness of railroad tariffs. *Robinson* v. *Balt. & Ohio R.R.*, 222 U.S. 506 (1912); *Great Northern Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922); *Barringer & Co.* v. *United States*, 319 U.S. 1 (1942); *United States* v. *Wabash R. Co.*, 321 U.S. 403 (1944); Cf. *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963); *United*

States v. *Scrap*, 412 U.S. 669 (1973); and *Atchison, Topeka and Santa Fe* v. *Wichita Board of Trade*, 412 U.S. 800 (1974). In *United States* v. *Wabash R. Co., supra*, for example, a district court had refused to enforce a Commission decision defining a railroad's tariff obligations because of its own conclusion that requiring compliance with the tariff would violate Section 2 of the Interstate Commerce Act. In reversing, this Court said: "In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether . . . the discrimination or preference is unlawful." And after noting that "a reading of the Commission's report and findings makes abundantly clear that it was not concerned with discrimination or preference such as are prohibited by Sections 2 and 3(1)," this Court said "in any case findings of discrimination or undue preference under Sections 2 and 3(1), as we have said, are for the Commission and not the courts" (321 U.S. at 410-413).

The rationale underlying these decisions was succinctly stated by this Court in *Great Northern R. Co.* v. *Merchants Elevator, supra* at 291:

> "To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

These considerations were fully applicable to the situation before the District Court in connection with the claims of the IHB. Nonetheless, that court ignored the absence of a Commission finding on the lawfulness of the tariffs and undertook to go beyond the record before it, viewing the issues in "the larger perspective of their interrelationships to the entire scheme of railroad charges and tariffs," and ultimately decided that the tariffs in question, as interpreted by the Commission, violated Section 2 of the Interstate Commerce Act. (Petition for Writ of Cert., Appendix B, District Court Opinion, pp. 8a-9a)

The IHB cites only one decision, *United States* v. *Louisiana & P.R.Co.*, 234 U.S. 1 (1914), as support for its claim that a court may set aside a Commission decision when it believes that decision may result in discrimination. The issue in that case, however, was whether certain branch railroad lines, which were owned by lumber companies and were principally used to carry the products of those companies, were common carriers under the Interstate Commerce Act. The Commission had concluded that they were not, and this Court reversed. This reversal was not based on any conclusion regarding discrimination, but solely upon the Court's view that the Commission had misapplied the definition of common carrier in the Interstate Commerce Act. One of the arguments advanced by the Commission in support of its decision was that it was necessary to prevent discrimination, and, in response to this argument, this Court indicated that the decision might also cause discrimination. This Court ultimately concluded, however, that the issue of discrimination was irrelevant because the Commission had full power to prevent any discriminatory practice that might arise.

If the Commission in the case before this Court had considered and decided the Section 2 issue, the District Court would have had authority to review the Commission's resolution of that issue. The Court of Appeals expressly recognized its power to do so. In this case, however, the Section 2 issue was not before the Commission, and the Commission

did not decide it. The Commission instituted its proceeding at the request of the defendants in order to resolve two issues which had been referred to it by the District Court. These two issues were whether the tariffs to which IHB was a party provided for charges on private car repair movements and whether such charges, if applicable, would be lawful. The question of whether movement without charge would be unlawful was never submitted to the Commission, and neither the Commission nor the Hearing Examiner considered or decided it. The Commission emphasized this in its report, stating that "in view of our decision herein, we do not reach any issue with respect to the lawfulness of any tariff". (341 I.C.C. 58, Petition for Writ of Certiorari, p. 48a) At the conclusion of its report, the Commission again stated that "since the switching charge sought to be applied by respondent [IHB] was inapplicable, it is unnecessary to determine whether it was an otherwise lawful charge". (341 I.C.C. 63, Petition for Writ of Certiorari, p. 55a)

II

HAVING FOUND THAT THE COMMISSION'S DECISION WAS SUPPORTED BY SOUND REASONING AND SUBSTANTIAL EVIDENCE, THE COURT OF APPEALS PROPERLY HELD, IN ACCORDANCE WITH THE DECISIONS OF THIS COURT, THAT THE COMMISSION'S INTERPRETATION OF THE TARIFFS SHOULD HAVE BEEN SUSTAINED.

In sustaining the Commission's interpretation of the tariffs in question, the Court of Appeals applied the well-established principle of administrative law that with respect to matters peculiarly within the competence of the Interstate Commerce Commission the courts cannot substitute their judgment for that of the Commission.* *United States* v. *New River Co.*, 265 U.S. 533, 542 (1924); *Georgia*

* The reconciliation of conflicting railroad tariffs is clearly a matter requiring the special expertise of the Commission. *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 65-66, 68 (1956).

Public Service Commission v. *United States*, 283 U.S. 765, 775 (1931); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 65-66, 68 (1956); *I.C.C.* v. *Martin Bros. Box Co.*, 219 F.2d 811 (9th Cir. 1955), cert. den. 350 U.S. 823; and *United States* v. *North Carolina Granite Corp.*, 288 F.2d 232, 235 (4th Cir. 1961). The Court of Appeals' decision on this issue does not present a novel question of law for this Court or one concerning which the Circuit Courts are in conflict.

In the decision of the District Court which was before the Court of Appeals, the District Court specifically indicated that the Commission's interpretation of the tariffs could not be overturned on the ground that it was not supported by substantial evidence and relied on its finding of a Section 2 violation in setting aside the Commission's decision.

The District Court said:

> ". . . this fact situation—at least explored superficially—is one in which good judgment could favor either contestant.
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> "Once this court finds substantial evidence in support of the Commission's findings, it cannot go further and inquire into the soundness of the Commission's reasoning or the wisdom of the result. Nonetheless, we have a recognized obligation under 5 U.S.C. § 706(2)(A), to set aside agency conclusions found to be otherwise not in accordance with the law. In this instance, we find that the conclusions reached by Division 2 precipitate a violation of Sec. 2 of the Act, which prohibits and declares unlawful any unjust discrimination by a common carrier." (Petition for Writ of Cert., Appendix B, District Court Opinion, pp. 8a, 11a)

With this conclusion of the District Court before it, and having properly concluded that the Section 2 issue could not be resolved in first instance by the courts, the Court of Appeals correctly sustained the Commission's interpretation of the tariffs. The Court of Appeals did not, however, rely solely on the District Court's conclusion that the Com-

mission's decision was supported by substantial evidence. It specifically describes in its opinion the basis for the Commission's interpretation of the tariffs and states its independent approval of that determination.* (Petition for Writ of Cert., Appendix C, Court of Appeals Opinion, pp. 23a-24a)

In support of its petition, the IHB cites as a conflicting authority on the tariff interpretation question the decision by the Seventh Circuit in *National Van Lines, Inc.* v. *United States,* 355 F.2d 326 (1966). That decision, however, is entirely consistent with the Seventh Circuit's decision in the case before this Court. In *National Van Lines,* the court held that a tariff in which a standard footnote had been inadvertently omitted should be interpreted in accordance with the drafters' intentions, i.e., with the footnote implied, and not as the Commission had interpreted it. The court preferred in that case, as it did in this one, a construction of the tariff which conformed to the manner in which the parties had interpreted it in practice. Also as in the present case, the Seventh Circuit approved the interpretation which allowed a *specific* tariff provision to take precedence over a *general* one, as the general provision would have completely nullified the tariff scheme involved in the specific one. In further support of its holding, the court in *National Van Lines* noted that the Commission's interpretation of the tariffs might result in a violation of law. It noted this, however, in conjunction with these other

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* The IHB incorrectly states in its petition that the Court of Appeals did not review the record before the Commission. This assertion is apparently based on a misinterpretation of the court's statement: "The conclusion of the district court to which we have just referred makes it unnecessary for us here to review in any detail the record or opinion of the Commission." It is obvious that the Court of Appeals in this statement is referring only to a review "here in our written opinion". That the Court did review the record and the opinion of the Commission is made abundantly clear by its numerous, specific references to both.

rules of tariff interpretation and, more importantly, with the benefit of the Commission's explicit admission that the Commission's interpretation would result in violations of the Interstate Commerce Act (315 I.C.C. at 542, 543).

Underlying the Commission's decision in *National Van Lines* is a critical factor which clearly distinguishes it from the Seventh Circuit's decision presently before this Court. In *National Van Lines,* the court emphasized that "although due weight should be accorded to the Commission's construction of a tariff," the particular circumstances before it did *not* involve "intricate facts of transportation" and deference to the Commission was not, therefore, necessary (355 F.2d 333). In direct contrast, the Seventh Circuit in the present case found that the situation before it involved matters "peculiarly within the competence of the Interstate Commerce Commission in the light not only of their [the tariffs] language but also of all the customs, practices and other underlying facts involved".

III

THE COURT OF APPEALS PROPERLY HELD THAT THE IHB DID NOT MAKE A SUFFICIENT SHOWING TO SUPPORT ITS CLAIM UNDER THE FIFTH AMENDMENT.

Before the Court of Appeals, the IHB made the argument that requiring it to comply with the provisions of its tariffs, as interpreted by the Commission, resulted in the unlawful taking of its property without compensation in violation of the Fifth Amendment. In its petition to this Court, the IHB incorrectly states that the Court of Appeals did not rule on this question and adds the related claim that the Commission's interpretation is unlawful because it requires "the rendering of free transportation without statutory authorization." Although this latter claim might properly be one for the Commission to consider in first instance, both assertions are completely invalid on the record in this case.

The movement of private freight cars to repair facilities without charge does not involve the performance of services without compensation. The line-haul and switching charges which the railroads collect on the commodities which move in freight cars are intended to compensate them for performing *all* the operations necessary to make such movements possible. These operations include moving empty freight cars to points where they can be loaded or to points where they can be repaired and returned to railroad service. Since the charges on loaded movements include compensation for the cost of necessary empty movements, the railroads are not permitted to assess an additional charge at the time those empty movements are made.

The fact that the cost of the empty movements of freight cars is a part of the cost of making loaded movements in those cars, and is, therefore, properly recovered through the charges on loaded movements was recognized by the Commission and the Courts in *Compensation for Transportation Service,* 332 I.C.C. 554 (1968); aff'd. sub. nom., *Southern Railway Company* v. *United States,* 306 F.Supp. 108 (E.D. Va. 1969). There the Commission rejected an attempt by the Southern Railroad to collect freight charges for making empty movements of freight cars owned by others. It concluded that (332 I.C.C. at 565):

> "Railroads historically move empty cars that have entered the national car fleet without compensation.
>
> "It is assumed that divisions of revenue derived from transporting loaded cars compensate for the movement of empties."

The Southern attacked the Commission's conclusion in an action before a three-judge federal court. It argued that its freight charges did not include compensation for the extraordinary empty movements which were involved and that, consequently, it was being forced to move those cars without compensation. The District Court rejected Southern's arguments and affirmed the Commission's order. It quoted

with approval the Commission's conclusions that "Railroads historically move empty cars that have entered the national car fleet without compensation" and that "It is assumed that divisions of revenue derived from transporting loaded cars compensate for the movement of empties" (306 F.Supp. 108, 114-115).

The requirement that the IHB make the repair movements of private freight cars without additional charge does not impose any burden upon it which is not borne by the other railroads. The record in this proceeding establishes that the requirement that repair movements be made without the exaction of a separate additional charge has been uniformly fulfilled by virtually all railroads for over fifty years. The car companies submitted evidence to the Commission which demonstrates that tens of thousands of repair movements are made each year and that virtually every railroad in the country participates in these movements. These railroads, without exception, are parties to tariff language virtually identical to that involved in this case. They include many switching lines as well as line-haul carriers that make repair movements without collecting or seeking to collect any charge (R. Item 15, Petitioner's Opening Statement, pp. 22-24).

There is absolutely nothing which distinguishes the IHB from the hundreds of other railroads which acknowledge and comply with the requirements of the mileage tariff. The IHB, like the other railroads, utilizes private freight cars to fulfill its transportation obligations and earns substantial amounts of revenue as a result. Privately-owned freight cars make thousands of loaded movements on the IHB from which the IHB collects hundreds of thousands of dollars in freight revenue each year.*

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* In *Cancellation of Private Car Allowances,* 322 I.C.C. 565 (1965), aff'd. 279 F.Supp. 270 (N.D. Ill. 1967), aff'd. per curiam 389 U.S. 88 (1967), the Commission specifically held, and this Court ultimately affirmed its conclusion, that nothing in the IHB's situation justifies exempting it from the mileage tariff obligations borne by all railroads resulting from the use of private cars.

If the IHB were permitted to assess charges on repair movements of privately-owned cars in addition to its charges on loaded movements, the shipper who provides his own car would be forced to pay twice for the same service. As noted, the published freight charges on loaded movements are designed to compensate railroads for the cost of repair movements. This is conclusively established by the fact that shippers who use railroad-owned cars pay only the published freight charge and do not pay an additional charge for the identical repair movements of these railroad-owned cars. An additional exaction for such movements of privately-owned cars would thus result in double payments for this service and would produce precisely the kind of discrimination which Section 2 of the Interstate Commerce Act prohibits. This is why the mileage tariff for years has provided that such empty movements of privately-owned freight cars will also be made without charge.*

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* The fact that railroads pay one another for empty repair movements off the line of the owning railroad is completely irrelevant to the issues here. These assessments, which are extremely rare, do not result in either discrimination or double payment. The railroads do not pay freight rates and their rules and obligations concerning the use of each other's cars are reciprocal—the effects of their application to the cars of one railroad are offset when that railroad applies the same rules to the cars of other railroads. In *Tank Car Allowances, Southern Ry. System*, 329 ICC 466, 478 (1967), the Commission recognized this distinction and specifically held that the rules relating to the handling of railroad cars are not indicative of the proper rules regarding private cars. Also, in *Louisville & Nashville R.R. Co.* v. *United States*, 282 U.S. 740 (1931), relied on by petitioner, this Court approved a decision by the Commission in which the Commission expressly distinguished between the lawful movement at less than tariff rates of executive office cars owned by the railroads and the lawful movement at no additional charge (above the freight rate) of empty, privately-owned cars which are designed and used for the production of revenue. This latter group of cars and the movements referred to by the Commission include precisely the ones involved in this case (Use of Passenger Train Cars, 155 I.C.C. 775, 787).

The tariff provision which imposes the obligation to make empty movements without charge does not distinguish between cars which are owned by shippers or cars which are leased by shippers. The tariff recognizes that in both cases the shipper who is providing his own car is paying a freight rate which assumes that a railroad-owned car will be provided. The portion of the railroad's transportation obligation which the shipper assumes when he provides his own car is the same, whether the car is leased or is owned by the shipper. The mileage tariff recognizes this by including leased cars, owned by car companies, as cars of private ownership within the scope of the tariff. The tariff, therefore, requires the railroads to make the same empty movements without charge in both cases.

The IHB's basic assertions in this regard, as well as the considerations noted above, were all before the Court of Appeals. In dismissing these claims, the Court cited the decision of this Court in *Baltimore & Ohio R.R. Co.* v. *United States,* 345 U.S. 146 (1953), which involved similar claims by railroads under the Fifth Amendment. In that case, this Court held "so long as rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of non-compensatory rates for carrying some commodities when the public interest is thereby served" (345 U.S. 150).

CONCLUSION

For the foregoing reasons, petitioner's request for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

.....
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.....
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1326

INDIANA HARBOR BELT RAILROAD COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. B, pp. 4a-12a) is reported at 368 F. Supp. 904. The opinion of the court of appeals (Pet. App. C, pp. 13a-24a) is reported at 510 F. 2d 644.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1975. The petition for a writ of certiorari was filed April 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly held that the district court erred in considering the lawfulness of certain railroad tariffs in reviewing the Interstate Commerce Commission's order finding such tariffs inapplicable.

2. Whether the court of appeals correctly determined that the district court erred in disregarding the Interstate Commerce Commission's findings on the inapplicability of the tariffs when the district court ruled that "good judgment" could favor the Commission's position.

STATEMENT

Petitioner initiated this case by bringing separate lawsuits against General American Transportation Corporation and North American Car Corporation in the United States District Court for the Northern District of Illinois. Petitioner sought to collect charges allegedly due for the movement of empty, privately owned, tank cars to and from the defendants' repair facilities, which were located on petitioner's switching line. The defendants denied liability and filed counterclaims against petitioner for refund of similar charges collected by petitioner for switching privately owned freight cars to and from their repair shops. The district court stayed the actions pending an administrative determination by the Interstate Commerce Commission whether the charges in question were in fact due under the applicable tariffs and if so, whether they were just and reasonable under the Interstate Commerce Act, 49 U.S.C. 1, *et seq.*

A Commission hearing examiner issued a report and recommended order concluding (1) that petitioner's charges were due under the applicable tariffs and (2) that the charges were not shown to be unjust or unreasonable (Pet. App. D, pp. 25a-45a). On exceptions, however, the Commission's Division 2 reversed the examiner, determining that under the applicable tariffs no charges were due for the movements of cars to and from defendants' repair facilities (Pet. App. E, pp. 46a-55a; 341 I.C.C. 57).

The Commission's decision was based upon its interpretation of four technical tariff provisions. For the period involved, movements of privately owned freight cars were generally governed by Agent B. B. Maurer's Mileage Allowance Tariff 7, I.C.C. No. H-32 (the "Mileage Tariff") (Pet. App. A, pp. 1a-3a).[1] Pursuant to the so-called "equalization rule" of this tariff, the railroads paid a mileage allowance on both empty and loaded miles to the car owner, and the car owner, in turn, paid to the railroad charges based on the number of empty miles not "equalized" by loaded miles, but empty cars considered as "instrumentalities of transportation" (*e.g.*, tank cars moving to and from repair shops) were moved without charge. As stated in Item 120 (Pet. App. A, p. 2a) of the Mileage Tariff:

> Except as otherwise provided in Items 25 and 30 (Application and Exceptions to Application), tank cars will be moved empty without charge at the time movement is made between stations or junction points on the line of railroads parties to this tariff * * *.

Item 25 (Pet. App. A, p. 1a), in turn, provided:

> Except as otherwise provided herein, these rules govern the payment of mileage allowances and equalization of mileage on tank cars when used by railroads, parties to this tariff, individually (or jointly where specifically provided herein), for transportation over their lines, including the movement to shops for repairs or reconditioning or returning therefrom * * *.

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[1]The Mileage Tariff was cancelled and superseded on January 1, 1971.

Item 30 (Pet. App. A, p. 2a) provided:

> The rules and mileage allowances published herein, will not apply on the following: (a) Movements of empty cars for which charges are assessed under tariff authority. * * *[2]

Before the Commission, petitioner maintained that its own switching charges, published in tariff IHB No. 325-U, I.C.C. No. 1160 ("Tariff 325-U") (Pet. App. A, p. 1a), came under the exceptions clause of Item 30 of the Mileage Tariff, which relieved it of its obligations under Items 120 and 25 of the Mileage Tariff. Petitioner's theory was that this result was accomplished by the provision of Tariff 325-U that stated charges for "Railway Equipment on own wheels, *viz.*: Empty Freight Cars." Citing the rule that the more specific designation applies whenever a commodity shipped is included in more than one tariff designation, the Commission found that petitioner's charge in Tariff 325-U was not contemplated by Item 30 of the Mileage Tariff because that Item was not specific enough to overrule the far more precise language of Item 25 (Pet. App. E, pp. 54a-55a). To hold otherwise, the Commission noted, would be to accept the "anomalous result of a vague and ambiguous exceptions provision countermanding and taking precedence over a more exact tariff rule" (Pet. App. E, p. 54a). The Commission reasoned that since Tariff 325-U speaks in terms of empty freight cars generally, the result of petitioner's interpretation of the various tariff provisions would be to cancel the basic mileage allowance provision of the Mileage Tariff as regards *all* empty cars, thus largely nullifying the Mileage Tariff (Pet. App. E, p. 55a). Accordingly, the Commission con-

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[2]Provisions similar to Items 120, 25, and 30 applied to other types of freight cars.

cluded that since there was no tariff rate available under Item 30 which would give effect to the exception, Item 25 governed; and since the Commission determined that the charge petitioner sought to have applied under Tariff 325-U was inapplicable, it declined to rule on whether that charge was otherwise lawful (Pet. App. E, p. 55a).

After the Commission's final decision, petitioner filed an action in the district court against the United States and the Interstate Commerce Commission, requesting that the Commission's order be set aside.[3] The district court consolidated the three suits and decided them in petitioner's favor (Pet. App. B, pp. 4a-12a; 368 F. Supp. 904). The district court, although recognizing that "good judgment could favor either contestant" (Pet. App. B, p. 8a), nevertheless ruled in favor of petitioner on the theory that "the conclusions reached by Division 2 precipitate a violation of Sec. 2 of the Act" (Pet. App. B, p. 11a) and are "otherwise unsound in respect to implementing the declared policy of the Interstate Commerce Act * * *" (Pet. App. B, p. 12a).

The court of appeals reversed (Pet. App. C, pp. 13a-24a; 510 F.2d 644), holding that "the district court in reaching its decision took into consideration matters not properly before it and that on the issue which was properly before it, the validity of the interpretation by the Commission of the tariffs involved, the court erred" (Pet. App. C, p. 21a). In particular, the court held that the lower court was without power to consider *ab initio* the question whether the application of the tariffs as interpreted by the Com-

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[3]Review was before a single-judge district court rather than a three-judge court, for the case involved a question of reparations (*United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 443) and was initially brought to the Commission by a referral of issues from the district court. 28 U.S.C. 1336(b); *Keller Industries, Inc.* v. *United States*, 449 F.2d 163, 166-167 (C.A. 5).

mission would result in a violation of Section 2, since this was a matter within the Commission's primary jurisdiction (Pet. App. C, pp. 21a-22a). The court further held that the interpretation of the tariffs was "peculiarly within the competence of the Commission to determine," and that the Commission's construction was consistent with the language of the tariffs as well as "all the customs, practices and other underlying facts involved" (Pet. App. C, p. 23a). Finally, the court rejected petitioner's contention that the Commission's decision forced petitioner to perform a service that resulted in the taking of its property without just compensation in violation of the Fifth Amendment of the Constitution, since "[petitioner] did not make the showing as to its over-all operations which was necessary to enable the court to consider such a claim" (Pet. App. C, p. 24a).

ARGUMENT

The decision of the court of appeals is in accord with settled principles of law and does not warrant review by this Court. In reviewing the decision of the district court, the court of appeals essentially reached two conclusions: (1) the district court had improperly considered matters which were not before it, such as the alleged violation of Section 2 of the Act caused by the Commission's construction of the tariffs; and (2) the district court incorrectly construed the applicable tariff provisions. Those conclusions are correct.

1. Matters relating to the lawfulness of rates under the Interstate Commerce Act, such as issues of discrimination under Section 2, are committed to the primary jurisdiction of the Commission. *United States* v. *Wabash R. Co.*, 321 U.S. 403, 413; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291. Thus, as the court of appeals stated, "the courts must enforce a rate, even though

alleged to be discriminatory, until the matter of discrimination has first been decided by the Commission" (Pet. App. C, p. 22a). See *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439-440. If petitioner desires to challenge the reasonableness of the charges prescribed by its tariffs, as construed by the Commission, its proper recourse is to file a complaint with the Commission under Section 13 of the Act, 49 U.S.C. 13, alleging a violation of Section 2. The Commission's decision in that complaint proceeding would, of course, be subject to judicial review.

2. As to the construction of the tariffs in question, the court of appeals correctly recognized (Pet. App. C, p. 23a) that "the reconciliation of these conflicting tariffs and the proper scope of each in view of the other was a matter peculiarly within the competence of the Commission * * *." See *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 65-66, 68. Here, as the court of appeals stated, the Commission considered the language of the respective tariffs, the applicable rules of construction of tariffs, the past treatment of the terms involved in the usages of the trade, its own past decisions, and other factors (Pet. App. C, pp. 23a-24a; Pet. App. E, pp. 54a-55a); the Commission's conclusion that Tariff 325-U was inapplicable was properly accorded great weight by the court of appeals.[4]

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[4]Petitioner attempts to show that the court of appeals erroneously declined to look at the evidence underlying the Commission's decision and that, had it done so, it would have seen that the Commission was unlawfully forcing petitioner to render "free" transportation (Pet. 9-10). That contention is without merit. The court of appeals found it unnecessary to review "in any detail" the record or the report of the Commission because of the conclusion of the district court that, on the basis of the record in the case, "good judgment could favor either view of the impact of the tariffs upon each other" (Pet. App. C, p. 23a). As the court of appeals correctly concluded, in view of the limited scope of review of the Commission's findings on technical questions of tariff interpretation, this finding by the district court compelled affirmance of the Commission's interpretation.

Moreover, petitioner never provided "free" transportation of cars moving to and from repair shops. Under the Mileage Tariff, petitioner

Finally, contrary to petitioner's contention (Pet. 10-11), there is no constitutional issue presented here with regard to the taking of petitioner's property without just compensation. This Court in *Baltimore & Ohio R. Co.* v. *United States*, 345 U.S. 146, 148-150, determined that a regulatory system cannot be held to have taken a carrier's property without just compensation unless the carrier has shown that it is unable to receive just compensation for its overall services to the public. No such showing was made by petitioner here.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1975.

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is compensated for the miles it must haul empty cars which are in excess of the number of miles it hauls loaded cars. In addition, the costs borne by petitioner for providing this service are included as part of total costs in setting rates for the transportation of freight. In any event, even if petitioner were performing "free" transportation—which is not the case—it still has no authority to collect a charge not covered by an applicable tariff. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co., supra,* 204 U.S. at 439.